Supreme Court, U.S.
FILED
MAY 8 1991
OFFICE OF THE CLERK

No. 90-1726

IN THE

Supreme Court of the United States

1990 TERM

WILLIAM KUNTZ, III (in his personal capacity as co-executor of the estate of William Kuntz, Sr.), as a common shareholder of the Peter Kuntz Company, on its behalf, as a member of a class of shareholders and in his own right,

Petitioner,

against

SHAWMUT BANK OF BOSTON, THE FIRST NATIONAL BANK OF CINCINNATI, THE CENTRAL TRUST BANK, THE SOCIETY BANK, THE MERCHANTS NATIONAL BANK & TRUST CO., BANK ONE DAYTON N.A., MERRILL LYNCH, PIERCE, FENNER & SMITH, INC., *et al.*, and JANE or JOHN DOES 1-299,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE THIRD DEPARTMENT OF THE APPELLATE DIVISION OF THE SUPREME COURT OF THE STATE OF NEW YORK AND/OR JUDGE DOMINICK VISCARDI, NEW YORK SUPREME COURT, ESSEX COUNTY.

PETITION FOR A WRIT OF CERTIORARI

BENJAMIN V. R. CONLON ESQ., LLB (HONS)
Barrister and Attorney at Law
Attorney for Petitioner
THORNCREEK LAW OFFICES
Keene Road
Elizabethtown, NY 12932-0937
(800) 338-2850
(518) 873-6346
FAX (518) 873-3255

THE REPORTER COMPANY, INC., Walton, NY 13856—800 252-7181—1991
(4784—LC2-929)

Questions Presented.

1. Has the petitioner a right to bring a suit in the name and on behalf of KTZ Inc., F/k/a the Peter Kuntz Company?

2. No court having ever ruled on the merits of the petitioner's case, the doctrine of *res judicata* does not apply.

Table of Contents.

Page

Grounds for Jurisdiction 2

Statement of Case 2

Prior Proceedings..... 2

Motions to Dismiss 8

Decision..... 11

Conclusion 12

1. Has the petitioner a right to bring a suit in the name and on behalf of KTZ Inc., F/k/a the Peter Kuntz Company?..... 13

2. No court having ever ruled on the merits of the petitioner's case, the doctrine of *res judicata* does not apply 13

CONCLUSION. This Honourable Court grant to the petitioner a Writ of Certiorari as pleaded in this petition..... 14

Table of Contents to Appendix.

Appendix A—Decision of the New York Court of Appeals Dated February 12, 1991 ..... 1a

Appendix B—Corrected Order of Affirmance of Appellate Division, Third Department, Dated July 31, 1990 ..... 1b

Page

Appendix C—Order of New York Supreme Court, Essex County, Appealed From, Entered June 22, 1989 ..... 1c

Appendix D—Plaintiff-Appellant's Brief in New York Supreme Court, Appellate Division, Third Department in Kuntz vs. The Shawmut Bank of Boston 1d

Appendix E—Petition for a Writ of Certiorari to the U. S. Court of Appeals for the Second Circuit in Kuntz vs. The Shawmut Bank of Boston and Mandamus to the U.S. Supreme Court (1988) 1e

Appendix F—Petition for a Writ of Certiorari to the Court of Appeals for the Second District—Montgomery County Ohio, in Kuntz vs. Winters National Bank and Trust Co. 1f

Appendix G—Supplemental Appendix in Kuntz vs. Winters National Bank and Trust Co..... 1g

TABLE OF AUTHORITIES.

CASES:

Brown v. Felsen, 442 U.S. 127, 131 (1979) 13

Chicot County Drainage District v. Baxter State Bank, 308 US 147, 153 (1979)..... 13

Commissioner of Inland Revenue v. Sunnen, 333 U.S. 591, 597 (1948)..... 13

Cromwell v. County of Sac, 94 U.S. 351, 352 (1877) 13

Page

Expert Electric, Inc. v. Levine, 554 F.2d 1227, 1232-33 (2d Cir.) cert. denied 434 U.S. 903 (1977) 14

Independent Investor Protective League, *et al.* (Appellants), v. Time, Inc. (Respondent), *et al.*, Defendants (50 NY2d 259) 13

Kuntz v. The Shawmut Bank of Boston, *et al.*, 86 Civ. 6771 (MGC) Opinion 12

Xerox Corporation v. Glenmoora Corporation, No. 88-1446, U.S. Court of Appeals, Fifth Circuit, 888 F.2d 345 13

STATUTES:

F.R.C.P. Rule 23.1..... 6, 7

OTHER AUTHORITIES:

1 B.J. Moore, Federal Practice 0.405 (1) (2d ed. 1974) 13

Tensions in the Allocation of Judicial Power, Martin H. Reddish, Bobbs-Merrill Co., Inc., Charlottesville, VA 1980 2

No.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1990.

WILLIAM KUNTZ, III (in his personal capacity as co-executor of the estate of William Kuntz, Sr.), as a common shareholder of the Peter Kuntz Company, on its behalf, as a member of a class of shareholders and in his own right,

Petitioner,

against

SHAWMUT BANK OF BOSTON, THE FIRST NATIONAL BANK OF CINCINNATI, THE CENTRAL TRUST BANK, THE SOCIETY BANK, THE MERCHANTS NATIONAL BANK & TRUST CO., BANK ONE DAYTON N.A., MERRILL LYNCH, PIERCE, FENNER & SMITH, INC., *et al.*, and JANE or JOHN DOES 1-299,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE THIRD DEPARTMENT OF THE APPELLATE DIVISION OF THE SUPREME COURT OF THE STATE OF NEW YORK AND/OR JUDGE DOMINICK VISCARDI, NEW YORK SUPREME COURT, ESSEX COUNTY.

PETITION FOR WRIT OF CERTIORARI

Grounds for Jurisdiction

Under the Provisions of 28 U.S.C. Paragraph 1257, an appeal for certorari to the United States Supreme Court from "final judgements or decrees rendered by the highest court of a state in which a decision could be had . . ." Federal Jurisdiction: Tensions in the Allocation of Judicial Power, Martin H. Reddish, Bobbs-Merrill Co. Inc., Charlottesville, VA 1980.

Statement of Case.

Plaintiff William Kuntz III (as common shareholder, and as member of a class of common shareholders of the Peter Kuntz Co.), appeals from several orders in favor of all the defendants, of the Supreme Court, Essex County, all filed on or about June 22, 1989 (Viscardi, J.). All these orders dismissed plaintiff's complaint, on three separate grounds: (1) lack of standing as an individual; (2) *res judicata;* and (3) lack of particularity as to allegations of fraud. It is important to note these three discrete grounds of dismissal, because the defendants' motions also discuss a jurisdictional objection, related to long arm jurisdiction. The issue of long arm jurisdiction was not determined by Judge Viscardi, although it was clearly presented to him by defendants.

Prior Proceedings

Defendants' *res judicata* and standing objections relate to a prior federal litigation between these parties in the Southern District of New York, commenced September, 1986. The merits of this controversy have never been determined in the federal action or this state case. There has never been a trial, or any hearing, and there has been no discovery.

The federal complaint pleads RICO, conspiracy in the commission of the RICO violations, securities fraud, breach of fiduciary duty, and breach of contract. The complaint alleged that most of the wrongs occurred in the Southern District and concerned securities trading activities.

The corporate victims of this wrong were the Peter Kuntz company ("PK") the North Central Mortgage company ("North Central"), and Scioto Savings and Loan ("Scioto"). PK owned a majority of the shares of both North Central and Scioto. PK was a lumber distributor, which entered the mortgage business through its ownership of North Central and Scioto. North Central and Scioto granted mortgages, and then packaged those mortgages for the secondary mortgage market. The fruits of this conspiracy were rich. PK, North Central and Scioto serviced over 300 million in assets in 1981.

The essence of the federal complaint is that PK, North Central, and Scioto were injured when the defendants, all acting in concert, thrust them into financial difficulties, with the intention of acquiring North central and Scioto for a depressed price, far below their true value.

Like many criminal conspiracies, shrouded in darkness, it is difficult to particularize the precise acts employed by defendants to accomplish this purchase of North Central, and Scioto at a depressed price.

But, the federal complaint pleads that the defendants compelled PK to assume obligations by notes and mortgages, amounting to approximately 13 million. The defendants' objective was not PK, but the acquisition of the lucrative Ohio mortgage business of North Central and Scioto. The weakening of PK, as the top of this pyramid, was the key to the acquisition of North Central and Scioto. North

Central's mortgage business threatened defendants in Ohio. Defendants wanted to split North Central away from PK, and wanted an established Ohio bank to acquire it.

Another "overt act" in defendants' scheme was to reduce the contractual lines of credit available to North Central, in order to make it insolvent, and to indirectly injure PK.

North Central, issuing V.A. and F.H.A. loans, was required by federal regs to limit interest rates. Prior to this conspiracy, North Central's secondary mortgage market activities were quite successful. North Central was expanding operations, and its business was vigorously competing with the defendants' business in the same Ohio market. To advance their goals of acquisition, the defendants were charging 22 per cent interest on loans to North Central, with the knowledge that North Central could only collect 13 per cent on the mortgages it granted. The defendants charged 22 per cent, although they used federal funds at 8 per cent when they granted loans to North Central.

Defendants threatened PK with bankruptcy. It alleged that the financial crisis surrounding PK, North Central and Scioto was artificial, and was engineered by defendants.

Merrill Lynch serviced the securities business of North Central and Scioto. These securities were federal obligations, or federally guaranteed obligations. Merrill Lynch had North Central and Scioto as its securities client, at the same time as it had Winters National Bank as its client [Winters is know known as Banc One Dayton]. Merrill Lynch was churning North Central's account, to put North Central into difficulties, in order to benefit its other client.

An Ohio probate court had before it the estate of William Kuntz, Sr. William Kuntz, Sr. founded North Central, and

was its chairman. That probate court subpoenaed Merrill Lynch's account records for North Central, but Merrill Lynch willfully declined to comply, with the intention of concealing its North Central activities. Merrill Lynch violated 10b-5 and 10b-16 in administering the North Central account.

Winters National Bank was a trustee of the estate of William Kuntz, Sr. Winters shared information it derived from the estate among the other defendants.

Merrill Lynch and the banks lending to North Central were fiduciaries. Merrill Lynch and these lenders were intimately familiar with North Central's confidential business affairs; the defendants shared that information among themselves.

The defendants' financial maneuvers coerced PK to sell North Central and Scioto.

This conspiracy thrust PK into liquidation on July 18, 1986, causing a total loss to its stockholders. PK had [annual] earnings of $20 or more per share from 1976 to 1980. Defendants' scheme reduced share earnings to a loss. On September 1, 1981, the defendants caused PK to sell North Central and Scioto to Society Bank (formerly named Third Nat'l. Bank & Trust), by the means of 13.5 million dollars in wired money transfers. Society Bank was acting in tandem with with Merchants National, Central Trust Bank, and Winters National Bank, and there were financial wire transfers between them to accomplish the objective. All of the securities transfers needed to accomplish this divestiture and purchase occurred in New York.

Society Bank wrongfully induced the Federal Reserve to approve Society's plan to purchase Scioto. False 10-K

annual reports were employed in this venture. Society Bank later sold North Central to Shawmet Bank.

The placements of defendants' representatives on the boards of PK, North Central and Scioto, and this interest rate squeeze, all deprived those corporations of any independent judgment.

A derivative shareholders demand was pleaded in paragraph 106. Plaintiff said that he made oral and written demands upon PK, North Central, and Scioto, and had voiced his objections at many shareholder meeetings, and in the probate administration of his grandfather's estate.

Class status was sought in the federal action.

This complaint attached extensive exhibits. The PK annual report shows that Kuntz family members predominated the corporate offices and the board of directors of PK. A number of wired money transfer memos, listing substantial dollar amounts, were made (Third Nat'l. to Winters, for N. Central; Third Nat'l. to Merchants, for N. Central; Third Nat'l. to Central for N. Central; Third Nat'l. to Winters for N. Central. Many of these defendants were transferring large sums among themselves related to North Central, according to certified wire transfers.

In the federal action, defendants made pre-answer dismissal motions. It held that plaintiff only alleged a diminuition in the value of his shares in PK. As that was his only injury, he lacked standing, and the right to sue belonged to PK. Alternatively, this action could be brought by a derivative action. The federal complaint was made *pro se.* The district court noted that derivative claims had to be made by counsel. The district court never reached the merits of this claim, but pointed out what F.R.C.P. rule 23.1 would require to be shown if this claim were brought derivatively.

Plaintiff appealed to the second circuit. The Court of Appeals repeated the district court's ruling on standing, and held that a *pro se* plaintiff could not present a derivative claim. It held that plaintiff had failed to properly plead a derivative claim under F.R.C.P. Rule 23.1.

Plaintiff sought certiorari from the U.S. Supreme Court, but the Clerk returned his petitions as being untimely brought. Subsequently, it was filed as a mandamus [October 1988, citations omitted].

This Action

The summons with notice states that defendants, acting in concert, employed a variety of methods to "defraud" plaintiff.

The complaint is labelled, "statement of claim." Plaintiff proceeded in four different capacities: (1) as co-executor of the estate of William Kuntz, Sr. (2) as a common shareholder of PK (3) as a member of the class of common shareholders of PK, and (4) as an individual who suffered loss by the "fraud."

It pleaded that PK was a close corporation, which beneficially owned North Central and PK (75). It specified the share ownership that William Kuntz, Sr., and plaintiff had in PK.

In July, 1976, PK was put into liquidation, harming its shareholders. This liquidation was caused by the defendants' unlawful conduct. Virtually all the defendants conspired to form a loan syndicate to put an interest rate squeeze on North Central, making North Central less competitive. This enabled Society Bank to engineer PK's sale of North Central and Scioto to Society bank. This scheme was in play from March 11, 1980 until June 3, 1988.

The methods employed to accomplish this objective were: (1) to influence financial markets to to unlawfully control North Central's business; to corruptly influence PK's management; and to influence Winters, as trustee of William, Sr., to breach its fiduciary duty to the estate.

The mails, telephone, wire, and meetings were used.

Although this complaint mentions the word fraud once or twice, the essence of the wrong does not relate to misrepresentation. The wrong involves predatory commercial conduct, without any representations. PK was put into a financial vise, with the intention of acquiring North Central and Scioto. Nowhere does the complaint plead any false representation. It complains about commercial piracy.

Motions to Dimiss

All the motions to dismiss are substantially identical. Shawmut's attorney's affidavit urges the absence of long arm jurisdiction. It argues that plaintiffs complaint:

> ". . . sound[s] only in fraud. . . . ."

Although there has never been any adjudication on the merits, counsel opined that this action had no basis in fact. Counsel discussed the federal rulings. Counsel Stewart A. Pomerantz failed to discuss the merits, except to state, in conclusory terms that this action "had no basis in fact," and was "frivolous". Nothing in the way of evidence on the merits was ever alluded to in Shawmut's papers.

The appended affidavit of Raymond Abdella (ass't Vice President of Shawmut), went only to the issue of long arm jurisdiction, which is not mentioned as a ground for dismissal in any of the orders appealed from.

Motion was made by Star Bank, Central Trust, and Merchants. The affidavit of counsel Charles D. Schmerler, cites to the federal rulings. James K. Lewis' affidavit is primarily addressed to long arm jurisdiction, but also very generally denies any participation in these facts. Stephen L. Smith, a Vice President of Merchants, attacked long arm jurisdiction, denying New York contacts, as did the affidavit of Samuel M. Cassidy.

Bank One's papers stated legal conclusions, except for the affidavit of Eric S. Sadow, which only went to long arm jurisdiction.

Merrill Lynch's papers reiterated the arguments raised by the prior dismissal motions, without adding anything different.

Plaintiff opposed, by counsel who cited state Court of Appeals' precedent that state courts share concurrent jurisdiction over RICO claims with the federal courts.

On particularity, Mr. Conlon said:

> ". . . the cause of action is clearly set out in the pleadings. . . . Furthermore, the Defendants have the benefit of previous pleadings in previous collateral actions in Federal [court]."

It was urged that these motions were a device to compel plaintiff to produce evidence at an advanced stage. Given that there has never been any discovery, this action has been adequately pleaded. After discovery, plaintiff would be able to amend with more specificity. Most juries would understand this claim without difficulty.

It was submitted that the merits have never been reached in either the federal or this state case. He said that *res judicate* was only applicable to determinations on the merits.

Plaintiff's exhibits included his brief to the U.S. Court of Appeals, which presented the question whether plaintiff had properly pleaded a derivative claim. This brief specified plaintiff's injuries:

> "(a) He no longer has any interest in the Kuntz Company as it was put into liquidation in July, 1986.
> (b) The Kuntz Company was stripped of its assets to the benefit of the Respondents subsequent to the said Company being forced to sell at a price advantageous to the Respondents.
> (c) The loss of such voting rights and any rights or benefits that any shareholder in the said Kuntz Company was entitled to enjoy, e.g. Discount."

Another injury was Winters National Bank's breach of its fiduciary dutes to the estate of William Kuntz, Sr.

On a derivaative shareholder's duty to make demand upon the corporation, Paragraph 106 of the federal complaint that discussed plaintiff's oral and written demands on the corporation was discussed. He said that proof of these demands could be made after discovery, when the minutes of board meetings could be examined; in those meetings, plaintiff made demands.

It was urged that PK was a close corporation, a "family corporation." As co-executor of his grandfather's estate, plaintiff had a duty to act when he believed that "the disposal of the estate's assets were not in the best interests of [the estate]."

A portion of his brief argued why the federal action qualified as a derivative action. On standing, counsel for the petitioner argued:

> "The action that Petitioner brings in not one which involves the Peter Kuntz Company and how it was managed. . . . He together with others have lost such benefits that they had as shareholders of the Kuntz Company by the conduct of Respondents, who forced the sale of assets and then the ultimate liquidation of the company."

Decision

The court noted the withdrawal of a defendants' argument. Their argument was that the federal courts have exclusive jurisdiction over all RICO claims.

Although characterizing plaintiff's state complaint as alleging a conspiracy to "perpetrate a fraud," the court had a better grasp on the facts when it described the complaint as alleging:

> "some sort of unlawful influence of the financial markets and control of North Central."

The decision fails to point to any alleged misrepresentation.

The court repeated the standing rule cited by the federal courts. It dismissed for absence of standing. It held that the federal opinions were *res judicata* on that issue. It held that this pleading was less than particular as to fraud. Devoid of representations, this controversy concerns exploitative bank takeovers, and is devoid of any disputed statements. Untruths are nowhere alleged, although sophisticated investment thuggery *is* alleged.

Conclusion

The orders should be reversed, and the complaint should be reinstated.

The petitioner has been totally unable to have the merits of the wrongs carried out by the respondents examined by any court of law in the United States due to the defendant's procedural tactics. When the petitioner first brought proceedings in the federal court he was denied remedy on the basis that he lacked standing and the court had no jurisdiction. Judge Cedarbaum in her original judgment at Appendix A-9 of the petitioner's Petition for a Writ of Certiorari to this Honourable Court (attached herewith as p. 37e):

> "I need not address the pendent claims of breach of contract and fiduciary duty since, in the absence of a proper claim arising under federal law, I can not exercise pendent jurisdiction to consider the related state claims. . . ." (*Kuntz v. The Shawmut Bank of Boston, et al.*, 86 Civ. 6771 (MGC) Opinion).

In reliance upon that decision the petitioner commenced action in the state courts where again the respondents have prevailed in preventing the merits being tested.

Unless he succeeds in this Petition the petitioner will have suffered loss and damage due to the conduct of the respondents without the benefit of a trial of the issues none of which have ever been challenged.

1. Has the petitioner a right to bring a suit in the name and on behalf of KTZ Inc., F/k/a the Peter Kuntz Company?

The petitioner repeats previous submissions made in the courts below in that he relies on the judgment in *Independent Investor Protective League, et al. (Appellants), v. Time, Inc., Respondent, et al., Defendants* (50 N.Y.2d 259); also *Xerox Corporation v. Glenmoora Corp.*, No. 88-1446, U.S. Court of Appeals, Fifth Circuit, 888 F.2d 345 (5th Cir. 1989).

2. No court having ever ruled on the merits of the petitioner's case, the doctrine of *res judicata* does not apply.

In the case of *Brown v. Felsen*, 442 U.S. 127, 131 (1979), this Honourable Court, in discussing the doctrine of *res judicata*, stated:

> *Res judicata* ensures the finality of decisions. Under *res judicata*, "a final judgment on the merits bars further claims by parties or their privies based on the same cause of action." *Montana v. United States*, 440 U.S. 147, 153 (1979). *res judicata* prevents litigation of all grounds for, or defenses to, recovery that were previously available to the parties, regardless of whether they were asserted or determined in the prior proceeding. *Chicot County Drainage Dist. v. Baxter State Bank*, 308 U.S. 371, 378 (1940); 1B J. Moore, Federal Practice 0.405 (1) (2d ed. 1974). *Res judicata* thus encourages reliance on judicial decisions, bars vexatious litigation, and frees the courts to resolve other disputes.

Accordingly, in the case of *Commissioner of Inland Revenue v. Sunnen*, 333 U.S. 591, 597 (1948); *Cromwell v. County of Sac*, 94 U.S. 351, 352 (1877), This Honourable Court stated:

> Spurred by considerations of judicial economy, and a public policy that favoured injecting certainty into the legal system, the doctrine of *res judicata*, judicial in origin, was established for the primary purpose of avoiding repetitive litigation of the same causes of action. Briefly stated, the parties to an action in which a judgment on the merits has been rendered, or their privies, are barred from relitigation the same cause of action in a second proceeding. *Expert Electric, Inc. v. Levine* 554 F.2d 1227, 1232-33 (2d Cir.), cert denied, 434 U.S. 903 (1977) (citations omitted).

The application now before this court seeks to impress the point that in applying the above judgments the courts below in New York State have ignored or misunderstood the concept of *res judicata* thereby creating more court work and greater cost.

CONCLUSION

This Honourable Court grant to the petitioner a Writ of Certiorari as pleaded in this petition.

Respectfully submitted,

BENJAMIN V. R. CONLON, ESQ., LLB (HONS)
Barrister and Attorney at Law
Attorney for Petitioner
THORNCREEK LAW OFFICES
Keene Road
Elizabethtown, NY 12932-0937
(800) 338-2850
(518) 873-6346
FAX (518) 873-3255

Appendix A—Decision of the New York Court of Appeals Dated February 12, 1991.

COURT OF APPEALS,

STATE OF NEW YORK.

Mo. No. 1361

WILLIAM KUNTZ, III, &C.,

Appellant,

v.

THE SHAWMUT BANK OF BOSTON, *et al.*,

Respondents.

Motion for leave to appeal denied.

Decision Court of Appeals Feb 12 1991

Appendix B—Corrected Order of Affirmance of Appellate Division, Third Department, Dated July 31, 1990.

At a Term of the Appellate Division of the Supreme Court of the State of New York, held in and for the Third Judicial Department, at the Justice Building in the City of Albany, New York, commencing on the 7th day of June, 1990.

Present:

Hon. T. Paul Kane, Justice Presiding
Hon. Leonard A. Weiss, Hon. Ann T. Mikoll, Hon. Thomas E. Mercure, Hon. Norman L. Harvey, Associate Justices.

WILLIAM KUNTZ, III (in his personal capacity), WILLIAM KUNTZ, III, (Co-Executor of the Estate of William Kuntz Senior), WILLIAM KUNTZ, III, (As a Common Shareholder in the Peter Kuntz Company), WILLIAM KUNTZ, III (As the Member of the Class of Shareholders),

Plaintiff-Appellant,

-against-

THE SHAWMUT BANK OF BOSTON, and THE FIRST NATIONAL BANK OF CINCINNATI, and THE CENTRAL TRUST BANK, and THE SOCIETY BANK, and MERCHANTS NATIONAL BANK & TRUST, and BANK ONE DAYTON N.A., and MERRILL LYNCH, PIERCE, FENNER & SMITH, INC., *et al.*, and JANE OR JOHN DOES, 1-299,

Defendants-Respondents.

County Clerk's Index #:59794

William Kuntz, III (in his personal capacity), William Kuntz, III, (Co-Executor of the Estate of William Kuntz Senior), William Kuntz, III, (As a Common Shareholder in

the Peter Kuntz Company), and William Kuntz, III, (As the Member of the Class of Shareholders), Plaintiff-Appellant, having appealed from five orders of the Supreme Court of Essex County, entered on June 22, 1989, June 26, 1989, June 30, 1989, July 10, 1989 and August 24, 1989, in the office of the Clerk of the County of Essex, and said appeal having been presented during the above-stated term of this Court, and having been argued by Benjamin V. R. Conlon, Esq. and Morgan Kennedy, Esq., of counsel for plaintiff-appellant, and by Peter D. FitzGerald, Esq., of counsel for respondent, Society Bank, N.A., and by Stewart Pomerantz, Esq., of counsel for respondent Shawmut Bank of Boston, and by Charles D. Schmerler, Esq., of counsel for respondent Star Bank, Central Trust Bank and Merchants National Bank and Trust, and by Karen M. Buckley, Esq., of counsel for respondent Merrill Lynch, Pierce, Fenner and Smith, Inc., and submitted by Cameron Clark, Esq., of counsel for respondent Bank One, and after due deliberation, the court having rendered a decision on the 12th day of July, 1990, it is hereby

ORDERED that the Orders so appealed from be and hereby are affirmed, with costs, upon the opinion of Justice Dominick J. Viscardi.

Michael J. Novack
CLERK

DATED AND ENTERED: July 31, 1990.

A TRUE COPY

Michael J. Novack
Clerk

Appendix C—Order of New York Supreme Court, Essex County, Appealed From, Entered June 22, 1989.

STATE OF NEW YORK, SUPREME COURT,

COUNTY OF ESSEX.

WILLIAM KUNTZ, III, (In His Personal Capacity), William Kuntz, III, (Co-Executor of the Estate of William Kuntz Senior), WILLIAM KUNTZ, III, (As a Common Shareholder in the Peter Kuntz Company), WILLIAM KUNTZ, III, (As the Member of the Class of Shareholders),

Plaintiff,

against

THE SHAWMUT BANK OF BOSTON, and THE FIRST NATIONAL BANK OF CINCINNATI, and, THE SOCIETY BANK, and MERCHANTS NATIONAL BANK & TRUST, and BANK ONE DAYTON, N.A., and MERRILL LYNCH, PIERCE, FENNER & SMITH, INC., *et al.* and JANE OR JOHN DOES, 1-299,

Defendants.

Index No.: 220-88

RJI No.: 30-CIV-6771

Assigned Judge: Hon. Dominick Viscardi

A motion having been made by defendant, Society Bank, N.A. (denominated "The Society Bank" in the Complaint) pursuant to CPLR § 3211 seeking dismissal of the Complaint against said defendant on the grounds that plaintiff lacks personal jurisdiction over said defendant because plaintiff failed to acquire a long arm jurisdiction and make proper service of process upon said defendant, that the Federal Courts have exclusive jurisdiction over "RICO" claims and thus the Court lacks subject matter jurisdiction, plaintiff lacks capacity to sue and that a shareholder of a company has no standing in bringing an action on his own behalf for diminution in the value of his shares, and the Complaint fails to state a cause of action because the plaintiff has failed to plead the material elements of the causes of action and has failed to plead with particularity the circumstances constituting fraud, and

UPON reading and filing the Notice of Motion to Dismiss dated October 14, 1988, the Attorney's Affidavit Veronica Carrozza O'Dell, Esq., duly sworn to on October 14, 1988, the Affidavit of Robert M. Haas, sworn to on October 12, 1988, the Affidavit of Mark A. Gamin, sworn to on October 13, 1988, the Memorandum of Law in Support of Society Bank, N.A.'s motion to dismiss October 14, 1988, with exhibits thereto, in support of the motion, and Plaintiff's Reply to Defendant's Motion to Dismiss Pursuant to His Honor Judge Viscardi's Order of November 2, 1988 by Benjamin V. R. Conlon, B.A. dated November 11, 1988, with exhibits thereto, in opposition thereto and upon all the pleadings and proceedings had heretofore herein, and the matter having come on to be heard before the undersigned, and Peter D. Fitzgerald, of LaPann, Reardon, Morris, FitzGerald & Firth, P.C. having appeared for oral argument on behalf of defendant, Society Bank and Benjamin Conlon, Esq. having appeared for the plaintiff, and argued on behalf of the plaintiff, and deliberation having been had thereon, and

The defendant having withdrawn its argument that the Court lacked subject matter jurisdiction over the plaintiff's legal claim on the basis of the Court Appeals in *Simpson Electric Corp. v. Leucadia, Inc.*, 72 N.Y.2d 450, decided October 25, 1988, and

NOW, on motion of LaPann, Reardon, Morris, FitzGerald & Firth, P.C., attorneys for defendant, Society Bank, N.A., it is

ORDERED, that the complaints of the plaintiff against defendant Society Bank, N.A., is dismissed on the grounds of lack of standing, *res judicata* and failure to plead with particularity, and it is

ORDERED, that this order is granted, without costs.

DATED: 6-16-89

HON. DOMINICK J. VISCARDI

ENTER

Received Jun 22 '89
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Appendix D—Plaintiff-Appellant's Brief in New York Supreme Court, Appellate Division, Third Department in Kuntz vs. The Shawmut Bank of Boston.

Time requested:
15 minutes

To be argued by
Benjamin V.R. Conlon

SUPREME COURT
APPELLATE DIVISION—THIRD DEPARTMENT.

WILLIAM KUNTZ, III (in his personal capacity; as co-executor of the estate of William Kuntz, Sr.; as a common shareholder in the Peter Kuntz Company; and as the member of the class of common shareholders),

Plaintiff-Appellant,

v.

THE SHAWMUT BANK OF BOSTON, and THE FIRST NATIONAL BANK OF CINCINNATTI, and, THE CENTRAL TRUST BANK, and, THE SOCIETY BANK, and MERCHANTS NATIONAL BANK & TRUST, and BANC ONE DAYTON, N.A., and MERRILL LYNCH, PIERCE, FENNER & SMITH, INC., *et al.*, and JANE OR JOHN DOES 1-299,

Defendants-Respondents.

Essex County Index No. 220-88

PLAINTIFF-APPELLANT'S BRIEF

BENJAMIN V.R. CONLON, B.A.
(for Plaintiff-Appellant)
Thorncreek P. O. Box 937
Elizabethtown, N.Y. 12932
(518) 873-7358 or
19 Old Building
Lincoln's Inn
London, England WC2R 3UR
011 411 831-6381

MORGAN KENNEDY
On the brief

INDEX

CPLR 5531 Statement 3d

Statement of the Facts..... 3d

Prior Proceedings..... 4d

This Action..... 8d

Motions to Dismiss 9d

Decision..... 12d

POINT ONE: This court should modify, by eliminating that portion of the order as dismissed this complaint with prejudice 13d

POINT TWO: The doctrine of *res judicata* was improperly applied to the federal opinions.... 15d

POINT THREE: Plaintiff is entitled to bring this claim individually, in one or more of the capacitites which he pleads 17d

POINT FOUR: Plaintiff does not plead any fraudulent misrepresentations. Because defendants have exclusive knowledge about their own misconduct, plaintiff's duty to particularize is lessened 25d

CONCLUSION: The orders should be reversed, and the complaint should be reinstated 28d

CPLR 5531 STATEMENT

1. The index number of this action in the Supreme Court, Essex County, is 220/88.

2. The only change in the names of the parties is that defendant First National Bank of Cincinnati became known as Star Bank, N.A., Cincinnati.

3. This action was commenced by plaintiff's service of a summons with notice on or about June 3, 1988. CPLR 3211 dismissal motions were made prior to answer.

4. The gravamen of this claim is that defendants employed damaging and unlawful financial tactics against Peter Kuntz Company, North Central Mortgage Company and Scioto Savings and Loan, for the purpose of acquiring North Central and Scioto at a reduced price. Peter Kuntz Co. owned substantially all the shares of North Central and Scioto, and these were close corporations. It is also alleged that the fiduciary bank for the estate of William Kuntz, Sr. (who was chairman of Peter Kuntz Co.) breached his duties by sharing estate information among the defendants, and by joining the conspiracy. No false statements are pleaded.

5. Plaintiff appeals from several orders of the Supreme Court, Essex County (Viscardi, J.), all entered on or about June 22, 1989, which, pursuant to CPLR 3211, all dismissed plaintiff's complaint, on the grounds of: (1) standing; (2) *res judicata;* and (3) failure to plead fraud with particularity.

6. The appendix method is used.

STATEMENT OF THE FACTS

Plaintiff William Kuntz III (as common shareholder, and as member of a class of common shareholders of the Peter Kuntz Co.), appeals from several orders in favor of all the defendants, of the Supreme Court, Essex County, all filed on or about June 22, 1989 (Viscardi, J.) (orders appealed from at 11-25; decision appealed from at 26). All these

orders dismissed plaintiff's complaint, on three separate grounds: (1) lack of standing as an individual; (2) *res judicata;* and (3) lack of particularity as to allegations of fraud (see 12; 15; 17; 20; 24). It is important to note these three discrete grounds of dismissal, because the defendants' motions also discuss a jurisdictional objection, related to long arm jurisdiction. The issue of long arm jurisdiction was not determined by Judge Viscardi, although it was clearly presented to him by defendants.

Prior Proceedings

Defendants' *res judicata* and standing objections relate to a prior federal litigation between these parties in the Southern District of New York, commenced June 3, 1988 (70). The merits of this controversy have never been determined in the federal action or this state case. There has never been a trial, or any hearing, and there has been no discovery.

The federal complaint (80) pleads RICO, conspiracy in the commission of the RICO violations, securities fraud, breach of fiduciary duty, and breach of contract (80). The complaint alleged that most of the wrongs occurred in the Southern District and concerned securities trading activities (87).

The corporate victims of this wrong were the Peter Kuntz company ("PK") the North Central Mortgage company ("North Central"), and Scioto Savings and Loan ("Scioto") (88). PK owned a majority of the shares of both North Central and Scioto (88). PK was a lumber distributor, which entered the mortgage business through its ownership of North Central and Scioto (89). North Central and Scioto granted mortgages, and then packaged those mortgages for the secondary mortgage market (89). The fruits of this conspiracy were rich. PK, North Central and Scioto had 300 million in assets (99).

The essence of the federal complaint is that PK, North Central, and Scioto were injured when the defendants, all

acting in concert, thrust them into financial difficulties, with the intention of acquiring North central and Scioto for a depressed price, far below their true value (92).

Like many criminal conspiracies, shrouded in darkness, it is difficult to particularize the precise acts employed by defendants to accomplish this purchase of North Central, and Scioto at a depressed price.

But, the federal complaint pleads that the defendants compelled PK to assume obligations by notes and mortgages, amounting to 8 million (92). The defendants' objective was not PK, but the acquisition of the lucrative Ohio mortgage business of North Central and Scioto (92). The weakening of PK, as the top of this pyramid, was the key to the acquisition of North Central and Scioto. North Central's mortgage business threatened defendants in Ohio. Defendants wanted to split North Central away from PK, and wanted an established Ohio bank to acquire it (96).

Another "overt act" in defendants' scheme was to reduce the contractual lines of credit available to North Central, in order to make it insolvent, and to indirectly injure PK (93).

North Central, issuing V.A. and F.H.A. loans, was required by federal regs to limit interest rates (94). Prior to this conspiracy, North Central's secondary mortgage market activities were quite successful. North Central was expanding operations, and its business was vigorously competing with the defendants' business in the same Ohio market (94). To advance their goals of acquisition, the defendants were charging 22 per cent interest on loans to North Central, with the knowledge that North Central could only collect 13 per cent on the mortgages it granted (94). The defendants charged 22 per cent, although they used federal funds at 8 per cent when they granted loans to North Central (95).

Defendants threatened PK with bankruptcy (95). It alleged that the financial crisis surrounding PK, North Cen-

tral and Scioto was artificial, and was engineered by defendants (96).

Merrill Lynch serviced the securities business of North Central and Scioto (91). These securities were federal obligations, or federally guaranteed obligations (91). Merrill Lynch had North Central and Scioto as its securities client, at the same time as it had Winters National Bank as its client [Winters is know known as Banc One Dayton] (100). Merrill Lynch was churning North Central's account (101), to put North Central into difficulties, in order to benefit its other client (100).

An Ohio probate court had before it the estate of William Kuntz, Sr. (101). William Kuntz, Sr. founded North Central, and was its chairman (103). That probate court subpoenaed Merrill Lynch's account records for North Central, but Merrill Lynch willfully declined to comply, with the intention of concealing its North Central activities (101). Merrill Lynch violated 10b-5 and 10b-16 in administering the North Central account (102).

Winters National Bank was a trustee of the estate of William Kuntz, Sr. (103). Winters shared information it derived from the estate among the other defendants (103).

Merrill Lynch and the banks lending to North Central were fiduciaries (102). Merrill Lynch and these lenders were intimately familiar with North Central's confidential business affairs; the defendants shared that information among themselves (103).

The defendants' financial maneuvers coerced PK to sell North Central and Scioto (95).

This conspiracy thrust PK into liquidation on July 18, 1986, causing a total loss to its stockholders (98). PK had earnings of $20 per share fron 1976 to 1980 (97). Defendants' scheme reduced share earnings to a loss (97). On September 1, 1981, the defendants caused PK to sell North Central and Scioto to Society Bank (formerly named Third Nat'l. Bank & Trust), by the means of 13.5 million dollars in

wired money transfers (98). Society Bank was acting in tandem with with Merchants National, Central Trust Bank, and Winters National Bank, and there were financial wire transfers between them to accomplish the objective. All of the securities transfers needed to accomplish this divestiture and purchase occurred in New York (100).

Society Bank wrongfully induced the Federal Reserve to approve Society's plan to purchase Scioto (109). False 10-K annual reports were employed in this venture (109). Society Bank later sold North Central to Shawmet Bank (84).

The placements of defendants' representatives on the boards of PK, North Central and Scioto, and this interest rate squeeze, all deprived those corporations of any independent judgment (104).

A derivative shareholders demand was pleaded in paragraph 106 (104) Plaintiff said that he made oral and written demands upon PK, North Central, and Scioto, and had voiced his objections at many shareholder meeetings, and in the probate administration of his grandfather's estate (104).

Class status was sought in the federal action (114).

This complaint attached extensive exhibits. The PK annual report shows that Kuntz family members predominated the corporate offices and the board of directors of PK (129). A number of wired money transfer memos, listing substantial dollar amounts, are appended (Third Nat'l. to Winters, for N. Central [134-a]; Third Nat'l. to Merchants, for N. Central [134-b]; Third Nat'l. to Central for N. Central [136-137]; Third Nat'l. to Winters for N. Central [138]). Many of these defendants were transferring large sums among themselves related to North Central, according to certified wire transfers (135).

In the federal action, defendants made pre-answer dismissal motions. The District Court opinion is at 139. It held that plaintiff only alleged a diminuition in the value of his

shares in PK (144). As that was his only injury, he lacked standing, and the right to sue belonged to PK 144. Alternatively, this action could be brought by a derivative action (145). The federal complaint was made *pro se*. The district court noted that derivative claims had to be made by counsel (146). The district court never reached the merits of this claim, but pointed out what F.R.C.P. rule 23.1 would require to be shown if this claim were brought derivatively (145).

Plaintiff appealed to the second circuit. The Court of Appeals repeated the district court's ruling on standing (147-148), and held that a *pro se* plaintiff could not present a derivative claim (148). It held that plaintiff had failed to properly plead a derivative claim under F.R.C.P. Rule 23.1 (148).

Plaintiff sought certiorari from the U.S. Supreme Court, but the Clerk returned his petitions as being untimely brought (149).

This Action

The summons with notice states that defendants, acting in concert, employed a variety of methods to "defraud" plaintiff (71).

The complaint (75) is labelled, "statement of claim." Plaintiff proceeded in four different capacities: (1) as co-executor of the estate of Willima Kuntz, Sr. (2) as a common shareholder of PK (3) as a member of the class of common shareholders of PK, and (4) as an individual who suffered loss by the "fraud." (75).

It pleaded that PK was a close corporation, which beneficially owned North Central and PK (75). It specified the share ownership that William Kuntz, Sr., and plaintiff had in PK (75-76).

In July, 1976, PK was put into liquidation, harming its shareholders (76). This liquidation was caused by the

defendants' unlawful conduct (76). Virtually all the defendants conspired to form a loan syndicate to put an interest rate squeeze on North Central (76), making North Central less competitive (76-77). This enabled Society Bank to engineer PK's sale of North Central and Scioto to Society bank (77). This scheme was in play from March 11, 1980 until June 3, 1988 (77).

The methods employed to accomplish this objective were: (1) to influence financial markets to to unlawfully control North Central's business (77); to corruptly influence PK's management (77); and to influence Winters, as trustee of William, Sr., to breach its fiduciary duty to the estate (77).

The mails, telephone, wire, and meetings were used (78).

Although this complaint mentions the word fraud once or twice, the essence of the wrong does not relate to misrepresentation. The wrong involves predatory commercial conduct, without any representations. PK was put into a financial vise, with the intention of acquiring North Central and Scioto. Nowhere does the state a complaint plead any false representation. It complains about commercial piracy.

Motions to Dimiss

All the motions to dismiss are substantially identical. Shawmut's attorney's affidavit urges the absence of long arm jurisdiction (38). It argues that plaintiffs complaint:

". . . sound[s] only in fraud. . . . ." (38).

Although there has never been any adjudication on the merits, counsel opined that this action had no basis in fact (39). Counsel discussed the federal rulings (39). Counsel Stewart A. Pomerantz failed to discuss the merits, except to state, in conclusory terms that this action "had no basis in fact," and was "frivolous" (39). Nothing in the way of

evidence on the merits was ever alluded to in Shawmut's papers.

The appended affidavit of Raymond Abdella (ass't Vice President of Shawmut), went only to the issue of long arm jurisdiction, which is not mentioned as a ground for dismissal in any of the orders appealed from.

The motion of Star Bank, Central Trust, and Merchants is at 47. The affidavit of counsel Charles D. Schmerler (50), cites to the federal rulings (52). James K. Lewis' affidavit (54) is primarily addressed to long arm jurisdiction, but also very generally denies any participation in these facts. Stephen L. Smith, a Vice President of Merchants, attacked long arm jurisdiction (62), denying New York contacts, as did the affidavit of Samuel M. Cassidy (65).

Bank One's papers (152) stated legal conclusions, except for the affidavit of Eric S. Sadow, which only went to long arm jurisdiction (159).

Merrill Lynch's papers (161) reiterated the arguments raised by the prior dismissal motions, without adding anything different.

Plaintiff opposed, by counsel Benjamin V.R. Conlon (260). He cited state Court of Appeals' precedent that state courts share concurrent jurisdiction over RICO claims with the federal courts (262).

On particularity, Mr. Conlon said:

> ". . . the cause of action is clearly set out in the pleadings. . . . Furthermore, the Defendants have the benefit of previous pleadings in previous collateral actions in Federal [court]."

Mr. Conlon urged that these motions were a device to compel plaintiff to produce evidence at an advanced stage (262). Given that there has never been any discovery, this action has been adequately pleaded (262). After discovery, plaintiff would be able to amend with more specificity

(263). Most juries would understand this claim without difficulty (262).

Mr. Conlon argued that the merits have never been reached in either the federal or this state case (263). He said that *res judicate* was only applicable to determinations on the merits (264).

Plaintiff's exhibits included his brief to the U.S. Court of Appeals (269), which presented the question whether plaintiff had properly pleaded a derivative claim (271). This brief specified plaintiff's injuries:

> "(a) He no longer has any interest in the Kuntz Company as it was put into liquidation in July, 1986.
> (b) The Kuntz Company was stripped of its assets to the benefit of the Respondents subsequent to the said Company being forced to sell at a price advantageous to the Respondents.
> (c) The loss of such voting rights and any rights or benefits that any shareholder in the said Kuntz Company was entitled to enjoy, e.g. Discount" (284).

Another injury was Winters National Bank's breach of its fiduciary dutes to the estate of William Kuntz, Sr. (284).

On a derivaative shareholder's duty to make demand upon the corporation, Conlon quoted paragraph 106 of the federal complaint, that discussed plaintiff's oral and written demands on the corporation (285). He said that proof of these demands could be made after discovery, when the minutes of board meetings could be examined; in those meetings, plaintiff made demands (285).

Conlon urged that PK was a close corporation, a "family corporation." (286). As co-executor of his grandfather's estate, plaintiff had a duty to act when he believed that "the

disposal of the estate's assets were not in the best interests of [the estate]." (286).

A portion of his brief argued why the federal action qualified as a derivative action (286-290). On standing, Mr. Conlon argued:

> "The action that Petitioner brings in not one which involves the Peter Kuntz Company and how it was managed. . . . He together with others have lost such benefits that they had as shareholders of the Kuntz Company by the conduct of Respondents, who forced the sale of assets and then the ultimate liquidation of the company." (288-289).

Decision

The court noted the withdrawal of a defendants' argument (28). Their argument was that the federal courts have exclusive jurisdiction over all RICO claims.

Although characterizing plaintiff's state complaint as alleging a conspiracy to "perpetrate a fraud," the court had a better grasp on the facts when it described the complaint as alleging:

> "some sort of unlawful influence of the financial markets and control of North Central." (29).

The decision fails to point to any alleged misrepresentation.

The court repeated the standing rule cited by the federal courts. It dismissed for absence of standing (31). It held that the federal opinions were *res judicata* on that issue (31). It held that this pleading was less than particular as to fraud (31). Devoid of representations, this controversy concerns exploitative bank takeovers, and is devoid of any disputed statements. Untruths are nowhere alleged, although sophisticated investment thuggery *is* alleged.

POINT ONE:

THIS COURT SHOULD MODIFY, BY ELIMINATING THAT PORTION OF THE ORDER AS DISMISSED THIS COMPLAINT WITH PREJUDICE.

These facts have been reviewed by several federal courts, and Judge Viscardi. *No* court has ever cast doubt upon the merits of the facts involved in this case. All the courts have merely reviewed alleged pleading defects which were said to offend the substantive law. No court has questioned that a wrong occurred. The courts have solely questioned whether this claim had to be brought derivatively, and whether the wrong was sufficiently particularized. The defendants have consistently failed to address the merits of this pleaded wrong. They failed to attach any evidence on the merits.

When the Appellate Divisions dismiss fraud complaints under CPLR 3016, because the pleader failed to particularize the fraud, they customarily permit the plead to replead. In *Meltzer v. Klein*, 29 AD2d 548, the Second Department held that the fraud complaint had to be dismissed for lack of specificity. However, its dismissal order granted the plaintiff 20 days to serve an amended complaint. In *Marcucilli v. Alicon Corp.*, 41 AD2d 932, the complaint did not comply with CPLR 3016, but the dismissal order granted leave to re-plead. In *Central School District v. Roch*, 61 Misc.2d 846, the Supreme Court noted the lack of particularization in the complaint, and observed:

> "In most cases, however, where the complaint inexpertly alleges a cause of action in fraud, opportunity is given to replead and amend." (61 Misc.2d at 849).

So too, in the federal courts under F.R.C.P. Rule 9 (b), in dismissing for lack of particularization, leave to replead is permitted (See *Segal v. Gordon*, 467 F.2d 602, 610).

The order dismissed because plaintiff had brought this action in his individual capacity, instead of derivatively. This ruling is based upon a pleading defect and the substantive law of shareholder status. Neither the federal courts nor the lower court cast any doubt upon the merit of this same claim, if it is brought derivatively. Those courts only passed upon his individual shareholder standing.

In *Bonneau v. Bonneau,* 21 Misc.2d 879, involving corporate assets in the marital estate, the court held that plaintiff's individual complaint was improper; this claim was required to brought derivatively. It granted the motion to dismiss the individual complaint, and granted leave to plead over derivatively. In *Bissell v. Taylor,* 229 App. Div. 369, the individual complaint had to be dismissed, and this claim had to be presented derivatively. But, the court granted leave to replead (229 App. Div. at 371).

Some derivative claims do not properly allege a demand on the corporation. In *Lewis v. Curtis,* 671 F.2d 779, the district court had dismissed with prejudice. The U.S. Court of Appeals held that this refusal to allow any motion to amend had been an abuse of discretion (671 F.2d at 789).

Litigants have a substantive, statutory right to amend under CPLR 3025, which is broadly construed, in the absence of prejudice. Legal expense, and the bother of a lawsuit do *not* constitute prejudice under CPLR 3025. Prejudice is something occasioned by completely new matter at a very late stage, which completely alters the lawsuit.

Defendants have had notice of the facts alleged in this claim since they received the federal complaint long ago. The basic theory of the federal case and this state action are the same. In *G.E. v. A.C. Towne Corp.,* 144 AD22d 1003, the Fourth Department held that Towne could not claim prejudice:

> "[Towne] had advance notice of the damages claimed through documents supplied to it by G.E.

> There can be no claim of prejudice because additional proof represents no more than a differing dollar amount of damages; the theory of the case and the essential proof were unchanged. Thus the court should have allowed the amendment. . . ." (144 AD2d at 1004).

It is American public policy that legal disputes be resolved upon their merits. To what inconvenience have defendants been put? They made conclusory motion papers addressed to two complaints. Defendants have never put any dispositive matter in evidence, and have avoided any hearing or trial on the merits. No court shed any doubt upon the facts of this claim.

Perhaps this claim must be brought derivatively. Perhaps the fraud must be particularized. But if plaintiff proceeds derivatively, and particularizes this fraud, then defendants shall be compelled to answer, and Article 31 discovery shall be available. If this court agrees with all of defendants' arguments, then maybe *this* pleading (*alone*) can be dismissed with prejudice. But this court should clearly permit plaintiff to plead correctly. Parties have been allowed to amend two successive times.

POINT TWO:

THE DOCTRINE OF *RES JUDICATA* WAS IMPROPERLY APPLIED TO THE FEDERAL OPINIONS.

The orders state that they are also based on *res judicata*. That doctrine has no application to these standing questions, because there is no identity in the issues involved.

Different courts apply standing in different ways. The United States courts have limited statutory subject matter jurisdiction. Their subject matter jurisdiction is limited by the case or controversy clause in Article III of the Constitu-

tion *(House Service v. Town of Brookhaven,* 91 Misc.2d 80, 88). Because of this different underpinning on standing,

> "The Federal standing law responds to "concerns that are peculiarly federal in nature" (*Arlington Hgts. v. Metropolitan Housing Corp.,* 429 U.S. 252, 262, n 8, supra) and is not binding upon state courts. . . . And state courts dealing with state questions clearly are not bound by the same standing limitations applicable to Federal jurisdictions." (91 Misc.2d at 87-88). (modif. other gds., 63 AD2d 131).

For this reason, there was no identity between the federal standing decision, and this state court standing decision. *Res Judicata* has no application where the issues and the relevant law are different. New York has broadened the category of persons entitled to challenge certain action *(See Dairlea Co-op v. Walkley,* 38 NY2d 6, 10-11). It is only when the plaintiffs always knew the different grounds upon which they could have based standing, but commence successive suits, each alleging a different standing ground, that our courts foreclose further litigation *(See Burns v. Egan,* 117 AD2d 38).

The Court of Appeals and the commentators question whether *res judicata* applies to standing determinations. In *Alco Gravure v. Knapp,* 64 NY2d 458, the Court of Appeals held that *res judicata* could not be applied to a New Jersey standing decision, because:

> "a dismissal for lack of standing as applied by the New Jersey courts is not a dismissal on the merits [citing Weinstein-Korn-Miller] (64 NY2d at 465).

Weinstein-Korn-Miller, NY Civil Practice, states that standing decisions are *not* on the merits, and it is this section which the Court of Appeals cited to in Alco Gravure:

> "At the opposite end of the spectrum, a dismissal for prematurity, *lack of standing*, . . . or other forms of procedural inadequacy unique to the particular case in the particular forum are not intended to have any determinative effect "on the merits" of the action." (parag. 5011.11, pp. 108-109) (emphasis supplied).

In *Searles v. Main Tavern, Inc.*, 28 AD2d 1136, the merits distinction was applied to a *res Judicata* claim involving an individual shareholder suit:

> "However, it is our opinion that the dismissal of the article 78 proceeding, on motion and without the taking of any proof, was equivalent to the dismissal of the petition for failure to state a cause of action and was not, therefore, an adjudication barring a subsequent action on a sufficient complaint." (28 AD2d at 1136).

For these reasons, the federal standing decisions do not bind the New York courts. The federal courts and the New York courts may reach the same standing decision in some cases, but the underpinning of their analysis is different.

POINT THREE:

PLAINTIFF IS ENTITLED TO BRING THIS CLAIM INDIVIDUALLY, IN ONE OR MORE OF THE CAPACITIES WHICH HE PLEADS.

Plaintiff proceeds in several capacities. His claims are not solely individual. His standing to present this claim as an individual and co-executor must be determined under New York law. The most crucial defendants are Society Bank, which purchased North Central and Scioto during the events complained of, and Winters Bank (now Banc One Dayton) which served as co-executor of the estate of

William Kunst, Sr., at the relevant time. Merrill Lynch's brokerage activities for PK, it is alleged, put PK into grave jepardy, for the purpose of accomplishing the takeover of North Central and Scioto.

This case is allowable. In *Eisenberg v. Flying Tiger Line, Inc.*, 451 F.2d 267, the individual plaintiff alleged that Flying Tiger Line had created a subsidiary, FTL. Flying Tiger Line then ceased operations, FTL took over the operations, and Flying Tiger Line shares were converted into FTL shares. The whole business was transferred to the subsidiaryy. Plaintiff said that this diluted his voting rights. He had lost voting rights in the Flying Tiger Line shares he bought. Plaintiff said his voting rights were personal to him, and had nothing to do with the corporation's right to proceed. The U.S. Court of Appeals agreed, and held that he did not have to post derivative action security, since he could proceed individually.

The courts of New York have always carved an individual exception when there has been egregrious and malicious misconduct. The cases which follow involved such misconduct.

In *Mtr. of Auditore,* 249 N.Y. 335, Frank Auditore was a corporate director, and administered his brother's estate. The estate held 50 per cent of the corporate stock. Frank wrongfully took all the assets of the corporation, and the corporation recovered an uncollectible judgment. On the estate's action against Frank, it was held that the estate (individually) could proceed, despite the fact that the corporation had previously prevailed on the merits. The holding was based upon Frank's duty to the estate, as administrator. Frank's wrongful act had caused a loss to the estate that he was bound to protect. It was held that his wrong to the corporation was distinct from the wrong he caused the estate. As administrator, he had the duty to collect the money that he had stolen from the corporation. That Frank's two capacities were held by the same person was

immaterial to the different duties attached to his separate capacities.

Here, it is pleaded that Winters Bank (now Banc One Dayton), as co-executor of the corporate chairman's estate (which included substantial holdings in the damaged corporations), acted in derogation of its duties to the estate. It is alleged that Winters was a participant in a conspiracy to coerce PK to sell its banks. It is pleaded that this conspiracy caused a substantial loss to PK, for the purpose of forcing its sale of these bank shares. Specifically, it is pleaded that Winters, as co-executor, shared confidential estate information with the other participants in the conspiracy. As co-executor, Winters was bound to protect the shares of PK, North Central, and Scioto held by the estate. Its participation in a venture to destroy PK violated its duties to the estate. (See also, *Witherbee v. Bowles,* 201 N.Y. 427).

In *Cutler v. Fitch,* 231 App. Div. 8, the plaintiffs owned shares in General Desk. A trust company loaned to this corporation, and a casualty company guaranteed the corporate debt. The last two obtained custody of the corporate shares to secure the debt, as pledgees. It was pleaded that they completely controlled this corporation, and all voting. It was pleaded that they were going to sell the corporate assets for unfair consideration. The court held that plaintiff could proceed individually against these pledgees. Winters Bank had a direct legal statutory duty to this estate.

In *Hammer v. Werner,* 239 App. Div. 38, the corporate directors acqquired a large block of the corporate shares, and held them as treasury stock, without allowing plaintiff to share ratably. Suing individually, plaintiff said this diminished his own holdings, and impaired his voting rights. He prevailed on an individual basis.

In *General Rubber Co. v. Benedict,* 215 N.Y. 18, Brazilian corporations were involved. Plaintiff owned General Rubber shares, and it was the holding company. The subsidiary was General Rubber of Brazil. Hutter, the general manager,

took the subsidiary's money, and gave it to Mojo Corp., which Hutter owned. The holding company proceeded individually, rather than derivatively. As general manager, Hutter held a position of good faith to his employer. For his wrongful failure to preserve the value of plaintiff's shares, he was liable.

In *Von Au v. Magenheimer,* 126 App. Div. 257, aff'd., 196 N.Y. 510, the estate (held by a surviving wife), held shares of the corporation. Defendants, the president and treasurer, owned other shares in it. What these officers did is relevant to the facts pleaded herein. The complaint pleaded that defendants coveted the stock owned by the estate. They conspired to obtain it for less than it was worth, and depressed its value through their control of the company. They did three things to accomplish their goal. They paid an unfair dividend, and the dividend was critical to the surviving spouse. They increased their own salaries dramatically. They represented that the corporation was in difficulty. None of this was explained by the defendants. This compelled the spouse to sell the shares to them. Fraud and deceit was the gravaman, since the company had been actually been more profitable than ever. Only bookkeeping created the impression of losses. The estate prevailed.

> "Coercion is as effective as deceit. The party deceived acts upon a misunderstanding; the party coerced acts because he has no choice. It is no answer to say that the wrong, if any, was to the corporation.... The wrong was aimed at and injured the plaintiff, not the corporation, and within the corporation she was practically at the mercy of the conspirators. . . . [They breached] the duty not to take advantage of the opportunity afforded by their position to wrong her by any affirmative act designed to injure. *** [T]hey owed her the duty [not] to depress the value of those shares for the

purpose of acquiring them at an undervaluation." (126 App. Div. at 266-267).

In *Ritchie v. M'Mullen*, 79 Fed. 529, there was a bailment of shares, and privity between plaintiff shareholder and the bailee had a duty not to harm the bailment in its custody. Plaintiff pleaded that defendants combined to reduce the value of these shares, to buy them cheaply. To accomplish this, defendants managed the company, repudiated valuable contracts, cut off dividends, and depreciated the value of those shares. *Ritchie* shows that injury to a corporation, as a means of acquiring its shares, is an age-old tactic. It was held that Ritchie, as pledgor, could proceed individually against the pledgees.

In *Kavanaugh v. Ford*, 353 F.2d 710, Ford, as manufacturer, and plaintiff, entered into an auto dealership contracts, naming plaintiff's corporate dealership. The court analyzed the true relationship between these parties, and found that Ford was, in fact, dealing individually with this high powered auto dealer. William Kunst, Sr., founded, and was the chairman of PK, at the time of these events, and was a moving force behind these corporations.

In *Vincel v. White Motors Corp.*, 521 F.2d 1113 [2d Cir. 1975], The Court noted that shareholder suits are allowed in this basic situation:

> "There were also situations in which an action by or on behalf of the corporation provides no remedy to an injured shareholder. This occurs, for example, in a "freeze out" operation when directors purposely carry on the business of a corporation so as to reduce the value of the corporate stock. A plaintiff, having then sold at a depressed price, no longer owns any part of the corporation and would derive no benefit from a corporate recovery. Under these circumstances, courts have permitted the former shareholder to sue the wrongdoer in his or her own name." (521 F.2d at 1119).

Here, it is pleaded that defendants' destructive tactics toward PK forced PK to sell its profitable banks to the conspirators. PK, which owned these banks, lost the jewel in its crown, and PK was thrust into liquidation. The estate was compelled to sell its shares in the two banks, and suffered a loss. Rather than directors causing the loss, it is pleaded that unrelated corporations plotted this scheme to obtain these shares at a reduced cost.

This is not a shareholder's claim to recover for the diminished value of his shares. Plaintiff, and his testator claim that these shares in North Central and Scioto were wrested from their hands by a concerted effort to destroy PK. Neither plaintiff, nor his testator have any present interest in North Central and Scioto. This plan succeeded in forcing them to sell those shares. They have no present title in these two banks, and have lost all voting rights. A derivative action, to benefit the current owners of North Central, will not occasion any benefit to plaintiff and his testator. It is only if they can proceed individually that they stand to recover their loss. Diminuition is not in issue, since plaintiff and the estate no longer have the shares. It is pleaded that defendants attempted to destroy PK, so they could wrest the two banks from it. Plaintiff alleges that this caused PK to be liquidated. Although he owns shares in PK, they are worthless, as PK was liquidated.

This claim is good. Just as an individual has a legal right to be free from assault and attack, a business has a right to conduct business, without being intentionally destroyed by its competitors. When individuals are the victim of that maneuver, they may recover.

> "Plaintiff's first cause of action, alleging that respondent and the other defendants by means of threats of criminal prosecution, conspiratorially forced plaintiff to transfer his stock in defendant Prince Chevrolet, Inc., to defendant Gurvitz and to

> perform certain other acts is legally sufficient. . . ." (*Prince v. Gurvitz,* 37 AD2d 727).
>
> "If the defendants conspired with the officers of the company to improperly deplete its treasury and thus render the corporation insolvent, in order that a sale might be made upon a foreclosure judgment, and the stockholders and creditors are thus deprived of their interest in the property, we see no reason why the damages recoverable may not be for the full value of the property and franchises of the corporation as it existed prior to the overt acts complained of producing insolvency. . . ." (*Niles & N.Y.C. & H.R.R.R. Co.,* 176 N.Y. 119, 125).

This action is not based upon corporate rights and privileges. It is based upon tort. In *Albemarle Theatre v. Bayberry Realty,* 27 AD2d 172, plaintiff theater owner leased his theater to defendants, who would operate it as a quality first run theater. In fact, the defendants degraded the Albemarle, in order to increase the profits of their own theaters.

> "It is alleged that the defendant contracting parties, in order to improve the operating position of other theatres owned by them . . . not only failed to operate the Albemarle Theatre responsibly pursuant to the contract, but affirmatively, intentionally and willfully set out in conjunction with other defendants to destroy the value and utility of the Albemarle Theatre henceforth as a theatre. Such allegations state a valid cause of action." (27 AD2d at 174).

Albemarle quoted *Prosser, Torts,* for the rule that every man owes to his fellow the duty to respect his rights of property and person "and refrain from invading them by force or fraud." (27 AD2d 176-177). The holding was *not* solely based upon contract, but was also based upon the duty to

refrain from injuring another person's property (27 AD2d at 177).

This complaint pleads that defendants intentionally destroyed PK, for the purpose of wresting away the bank shares cheaply. That allegation states a claim.

Plaintiff, as co-executor, may individually proceed against Bank One, as successor to Winters Bank, for Winter's breach of its duties to the estate. Winters, it is alleged, was a member of a conspiracy which had as its object the destruction of PK, and the purchase of PK's interest in North Central and Scioto for an unfair consideration. Shares in PK, North Central and Scioto were held by the estate (*Mtr. of Auditore*, 249 N.Y. 335).

The object of this conspiracy was to tortiously compel PK to sell its two banks. In *Eisenberg v. Flying Tiger Line, Inc.*, 451 F.2d 267, the holding company's business was transferred over to the subsidiary, with consequential dilution of plaintiff's shares in the holding company, and impairment of his voting rights. The dismemberment of PK's business, to accomplish this sale of the banks, tortiously deprived plaintiff and his testator of share ownership in North Central and Scioto, and completely eliminated their voting rights in those two banks.

Some federal cases are viewed as holding that an individual may not present a RICO claim. But that is a gross generalization. What the federal courts really mean is this. When state corporate law requires a person's corporate grievance to be brought derivatively, then that individual cannot individually plead a RICO claim. That is the holding of *Nordberg v. Lord, Day & Lord*, 107 F.R.D. 692. But in cases where the state would permit the individual to claim individually, then he may present a RICO claim individually. *Nordberg* and the other cases observe the traditional derivative-individual distinction for RICO actions.

> "The court will first determine whether plaintiffs have alleged a corporate injury or an injury personal to them." (*Nordberg*, 107 F.R.D. at 697).

Rand v. Anaconda-Ericson, Inc., 794 F.2d 843, proceeds upon the same derivative-individual framework that this Court is confronted with herein (794 F.2d at 849). Hence, if New York courts find that plaintiff may proceed individually, then the New York courts, applying RICO, may grant relief to plaintiff under RICO.

POINT FOUR

PLAINTIFF DOES NOT PLEAD ANY FRAUDULENT MISREPRESENTATIONS. BECAUSE DEFENDANTS HAVE EXCLUSIVE KNOWLEDGE ABOUT THEIR OWN MISCONDUCT, PLAINTIFF'S DUTY TO PARTICULARIZE IS LESSENED.

Looking at the four corners of this complaint, fraud and misrepresentation are not pleaded. What *is* pleaded is defendant's tortious destruction of PK, with the goal of acquiring its two banks for insufficient consideration. PK was not relying, to its detriment, upon the words or deeds of the defendants. PK was being coerced to agree to sell North Central and Scioto. Coercion and fraud are distinct.

Plaintiff has, however, basically pleaded breach of trust against Winters Bank as co-executor. This aspect of CPLR 3016 does not help Winters:

> "Ordinarily, fraud must be proven by the party alleging it. * * * Where, however, fraud is alleged in the context of a fiduciary or other confidential relationship where one party possesses superior knowledge, fraud is presumed and the burden is upon the benefited party to demonstrate the absence thereof." (*Estate of Henry Paul*, 105 AD2d 928, 929 [3rd Dep't. 1984]).

The allegations are simple: (1) destruction of PK by an interest rate squeeze; and (2) interference with PK's credit lines. Both of these effects are alleged to have been caused by artificial conditions, rather than market circumstances. It is alleged that (3) PK was substantially impaired (4) so that defendants could eliminate it as a competitor in the Ohio mortgage market; and (5) so that defendants could coerce PK to part with its shares in the lucrative North Central and Scioto banks. Similar facts have been held to constitute a valid cause of action, *supra*. That defendants have unilaterally called this a fraud action does not detract from its traditional viability as a cause of action. Rather, defendants should be asked to particularize why this must necessarily be classified as a fraud action. They should be asked to explain why similar facts have been accepted as valid causes of action since *Ritchie v. M'Mullen*, 79 F.2d 529, and its English progeny. In more recent times, rather than fraud, the cases have considered a shareholder's rights and privileges as a voter, or his right to be free from dilution. The tort of wilfull attack upon a business is also mentioned (*Albemarle*).

A commercial wrong, an attack upon PK for private gain, is pleaded. Defendants have adequate notice of what it is alleged that they did to PK—they destroyed its business, and coerced the sale of its two banks. All that CPLR 3013 requires is that the complaint state a cause of action cognizable in New York, though the pleading be pathetically drawn (David D. Siegel, *Practice Commentaries, McKinneys Cons Laws*, parag C3016:6, p. 614). Defendants have not moved for a more definite statement under CPLR 3024 [a]. Today, courts overlook defects in pleadings because the parties can obtain detail through discovery (*Id.*, parag. C3013:8, p. 616). If the defendant has gotten notice elsewhere, prior to the pleading, CPLR 3013 is satisfied (*Id.*, C3013:2, p. 611). Hence, to examine this state complaint for fraud particularity, the court should examine the

notice which defendants previously obtained from the federal litigation.

The CPLR 3013 standard and the CPLR 3016 standard are virtually identical:

> "In other words, what's good enough for CPLR 3013 is good enough for CPLR 3016 (b)." (David D. Siegel, *Practice Commentaries,* CPLR 3016, C3016:3, p. 71).

Pleadings may contain pleading defects, but that is not enough for dismissal. The party attacking the pleading must show that he has been prejudiced (*Foley v. D'Agostino,* 21 AD2d 60, 65).

It is pleaded that defendants conspiratorially accomplished this result through financial and securities trickery. The caselaw is legion that the duty to particularize is substantially lessened when the other party has exclusive knowledge of the facts, and "it may be impossible to state in detail the circumstances constituting the fraud." (*Jered Const. Corp. v. N.Y.C. Transit Authority,* 22 NY2d 187, 194; *Lanzi v. Brooks,* 43 NY2d 778, 780; *P.S. Auctions, Inc. v. Exchange Mut. Ins. Co.,* 105 AD2d 473, 475 [3rd Dep't. 1984]; *Mattera v. Mattera,* 125 AD2d 555, 557; *Haynes v. CRC Information Systems, Inc.,* 69 AD2d 775).

The thrust of this wrong was not personally directed at plaintiff William Kuntz III. Plaintiff stands in the shoes of his testator. Less particularity is required when a third party was the principal victim of a fraud, rather than the plaintiff (*Allegaert v. Perot,* 78 F.R.D. 427, 430 [S.D.N.Y.1]).

The cases *supra,* establish that a valid claim was pleaded, at least against Winters Bank. Under contemporary law, that wrong does not consist of fraud. Rather, it is equivalent to an assault upon a person, and consists of a tortious wrong against an individual's property.

When a CPLR 3211 [a] [7] challenge is made against the entire complaint, and a court finds that one of the causes of action is good, there is authority that the entire dismissal motion must be denied (David D. Siegel, *Practice Commentaries, McKinneys Cons Law,* CPLR 3211, C3211:26, p. 32; *Griefer v. Newman,* 22 AD2d 696).

Every pleaded fact must be accepted as true, and the pleading must be liberally construed in plaintiff's favor (*Barr v. Wackman,* 36 NY2d 371, 375).

CONCLUSION

THE ORDERS SHOULD BE REVERSED, AND THE COMPLAINT SHOULD BE REINSTATED.

Respectfully submitted,

BENJAMIN V.R. CONLON, B.A.
(for Plaintiff-Appellant)
Thorncreek P.O. Box 937
Elizabethtown, N.Y. 12932
(518) 873-7358 *or*
19 Old Building
Lincoln's Inn
London, England WC2R 3UR
011 411 831-6381

Appendix E—Petition for a Writ of Certiorari to the U. S. Court of Appeals for the Second Circuit in Kuntz vs. The Shawmut Bank of Boston and Mandamus to the U.S. Supreme Court (1988).

No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

WILLIAM KUNTZ III, *et al.*,

Petitioner,

– against –

THE SHAWMET BANK OF BOSTON, THE FIRST NATIONAL BANK OF CINCINNATI, THE CENTRAL TRUST BANK, SOCIETY BANK, MERCHANTS NATIONAL BANK & TRUST, BANK ONE DAYTON N.A., MERRILL, LYNCH, PIERCE, FENNER & SMITH, INC., *et al* and JANE OR JOHN DOES, 1-299,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE U.S. COURT OF APPEALS FOR THE SECOND CIRCUIT

BENJAMIN V.R. CONLON, ESQ.
Barrister at Law of
the Honourable Society of Gray's Inn
Gray's Inn, London, England
WC1

Attorney for Petitioner,
William Kuntz III

Thorpe Bay
Essex
18.IV.88

U.S. Phone Number:
(518) 432-4724

(For North American Address See Inside Cover)

Favor of Your Reply
NORTH AMERICAN CHAMBERS
c/o 11 N. Pearl Street
Room 702
Albany, New York 12207

U.K. Phone/FAX:
011/44/702/584715

Questions Presented

1. Does the Petitioner have standing to maintain an individual action against the respondents for the recovery of his stock and/or damages.

2. Is the Petitioner, in his capacity as a shareholder in Peter Kuntz Company, Dayton, Ohio; able to bring any actio.. to remedy an alleged injury to the said corporation by virtue of the Respondents being in breach of the provisions of the Racketeer Influenced and Corrupt Organizations Act 18 USC sections 1961-68.

3. As the Co-Executor of the Last Will and Testament of William Kuntz Senior, does the Petitioner not only have the capacity to bring an action to remedy an alleged injury to the said corporation by the Respondents being in breach of the Racketeer Influenced and Corrupt Organizations Act, but failure to bring such an action, could make him liable to the Beneficiaries, under the said Last Will and Testament of William Kuntz Senior.

4. Has the Petitioner not fulfilled the requirements of Rule 23.1 of the federal rules of Civil Procedure and is thereby entitled to bring a derivative action against the Respondents.

5. Is it not wrong in principal, in the circumstances of this particular case, that the Petitioner should be unable to maintain a derivative action PRO SE.

6. Does the application of the doctrine in the case of *Phillips v. Tobin*, 548 F.2d 408, 411 (2nd Cir. 1976) as applied by both the Federal District Court and The US Court of Appeals in this case not conflict with the provisions of Rule 11 of the Federal Rules of Civil Procedure and Rule 28 of the US Court of Appeals Rules paragraph 1654.

7. Can the Respondents, having been given sufficient particulars of the actions alleged against them by the Petitioner in the Honourable Courts below as required by the provisions of Rule 9(b) of The Federal Rules of Civil Procedure when alleging injury under the said Racketeer Influenced and Corrupt Organizations Act, have this action dismissed?

TABLE OF CONTENTS

	Page
1. Table of Authorities Cited	v
A. Further Authorities Not Cited Directly	vii
2. Questions Presented	i
3. Statement of Petitioner's Case	1
A. General Background	2
B. Arguments in Support of Petitioner's Application for Writ	4
4. Appendix	
(i). Order of Court of Appeals for Second Circuit Docket No. 87-7564	A-1
(ii). District Judges Opinion Dated May 12, 1987	A-3
5. Petition for Writ of Certiorari to the Court of Appeals for the Second District, Montgomery County, Ohio, in the Matter of the Estate of William Kuntz, United States Supreme Court, October Term 1983	7
6. Petition for a Writ of Certiorari to the Court of Appeals for the Second District, Montgomery County, Ohio, in the Matter of the Estate of William Kuntz. *William Kuntz, III v. Winters National Bank and Trust Company et al.*, United States Supreme Court, October Term 1986	7

TABLE OF AUTHORITIES

	Page
Alegaert v. Perot, 78 FRD 427 (1978)	15
Cohen v. Beneficial Industrial Loan Corporation, 337 US 541 (1949)	10
Faretta v. California, 422 U.S. 806, 830 (1975)	11
Felton v. Walton & Co., Inc., 505 F. 2d 577 (1974)	16
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Kaufman v. Chase Manhattan Bank N.A., 581 F. Supp. SDNY (1984)	5, 7
Lewis v. Curtis, 671 F. 2d 779, 784 (3rd Circuit)	7
Nordberg v. Lord, Day, Lord, 107 FRD 692 (1985)	5, 6
Phillips v. Tobin, 548 F.2d 408 (1976)	2, 9, 11
Rose v. Bernard, 396 US 531 531 (1970)	10
TSC Industries, Inc. v. Northway Inc., 438 (1976)	16
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Page

Statutes and Rules

Racketeer Influenced and Corrupt Organization Act, 18 U.S.C. 1961-68 ..... 1, 6

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

WILLIAM KUNTZ, III, *et al.*,

Petitioner,

—against—

THE SHAWMET BANK OF BOSTON,
and Others.

PETITION FOR A WRIT OF CERTIORARI TO THE U.S. COURT OF APPEALS FOR THE SECOND CIRCUIT

STATEMENT OF PETITIONER'S CASE

A. General Background.

The Petitioner is a resident of New York. After the Death of his grandfather (William Kuntz Senior) on March 5th, 1980, the Petitioner and Paul W. Heinz were appointed Co-Executors to the said deceased's Last Testament and Will on March 11th, 1980. Under the terms of the aforementioned Will the net residuary estate was bequeathed and devised to the Winter's National Bank and Trust Co., as Trustees for the benefit of the Mary Ann Kuntz Dillon (the deceased's daughter) and the Petitioner.

At the time of his death, the aforementioned deceased was the owner of 1,210 shares of preferred stock having a par value of

$100.00 and paying a dividend of $5.00 per annum which had not been passed. The deceased at the time of his death was also the owner of the following:

(a). One share of the common stock of each of twenty-one different subsidiary companies of The Peter Kuntz Co.

(b). One ninth of One share of One subsidiary company of The Peter Kuntz Company.

(c). One share of preferred stock of two different subsidiary companies of The Peter Kuntz Company.

(d). Some 7,760 shares of common stock of The Peter Kuntz Company.

On September 11, 1980, Winters Bank as Trustee filed an application in the Probate Court of Montgomery, Ohio seeking the removal of the Petitioner as an Executor. Amongst the reasons given were that he either refused or neglected to sell 1,210 preferred shares of The Peter Kuntz Company and the 18 shares of various lumber companies.

The Peter Kuntz Company supplied building supplies and was founded by the Petitioner's great grandfather Peter Kuntz Senior. It was a private company and its remaining business assets were acquired by Erb Lumber Company of Birmingham, Michigan in July 1986, this then merged into Fredco, Inc., in late December 1986. The Petitioner owned 234 preferred shares in The Peter Kuntz Company (hereinafter referred to as The Kuntz Company) as well as common shares.

The Petitioner commenced his action subsequent to the liquidation of the Kuntz Company and the sale of its interest in the North Central Mortgage Company (hereinafter referred to as the North Central). This was a sale which the Petitioner had always resisted but as a result of the action of the Respondents (as alleged by the Petitioner in his complaint filed before the Court of first instance) North Central was sold to the Third National Bank and Trust Co., (known as The Society Bank, Fourth named Respondents). It is now owned by The Shawmet Bank of Boston

the First named Respondent (hereinafter referred to as Shawmet Bank). Part of the assets of the North Central included an interest in the Scioto Savings and Loan Association of Columbus, Ohio, (hereinafter referred to as Scioto Savings). This interest continues to be owned by Society Bank. The Petitioner maintains that both the North Central and the Scioto Savings were assets of The Kuntz Company and that they were the subject of the racketeering intentions of all the named Respondents.

In 1981 The Kuntz Company owned the majority of shares of North Centrai whose business was the granting and collecting of mortgages. These mortgages together with relevant insurances were sold on occasions as packages to stockbrokers in the City of New York, and County of Manhattan. The Kuntz Company or North Central also owned the outstanding shares of Scioto Savings whose principal business was lending money in the form of mortgages and in cross-lending and packaging mortgages to North Central.

The Petitioner maintains that with the exception of the first Respondent all the Respondents conspired to form a loan syndicate which forced the North Central to have to borrow funds at higher rates than it could charge to its customers. Such activity caused North Central to become less competitive and it began to suffer loss. This then affected the financial viability of The Kuntz Company which was threatened by all Respondents (except the first) with Bankruptcy proceedings. The artificial crisis created by these Respondents upon The Kuntz Company, North Central and Scioto Savings enabled one of the said Respondents namely Society Bank to purchase from The Kuntz Co., its interest in both North Central and Scioto Savings. In consequence of this action The Kuntz Company was forced into liquidation in July 1986, with almost a total loss to the Petitioner and other Shareholders.

The Petitioner filed an action for remedy against all aforementioned Respondents on September 2nd 1986, in the US Federal District Court, Southern District of New York (Docket No. 86 Civ 6771). The Petitioner was not represented and appeared Pro Se before the Honourable Court which considered a motion to

dismiss brought by the said Respondents. This motion to dismiss was granted by the Learned Judge and affirmed by the US Court of Appeals, Second Circuit (both Judgements of the aforementioned are attached to this Petition). It is the judgements and decision of both the Honoúrable Courts below which form the basis of this Petition.

B. Arguments in support of Petitioner's Application for Writ.

1. The Petitioner has Standing to maintain an individual action against the Respondents.

The Petitioner in order to establish standing to bring an action on his own behalf has to demonstrate to the court that he has suffered harm other than just diminution of the value of his shares. *Kauffman v. Dreyfus Fund*, 434 F.2d 727 (3rd Cir. 1970), *Vincel v. White Motor Corp.*, 521 F.2d 113 (2nd Cir.). *Nordberg v. Lord, Day & Lord*, 107 Frd 692 (SDNY, 1985). In the circumstances of the Petitioner's case it is clear from the matters alleged in his pleadings in the Honourable Courts below that his loss is a DIRECT SUBSTANTIAL LOSS. The losses which were considered in the aforementioned cases were as follows:

(a). *Kauffman v. Dreyfus.* Shareholders in four out of sixty-five mutual trusts who complained that as a result of the alleged illegal activities of the Defendants the value of their shares were diminished.

(b). *Vincel v. White Motor Corp.* Here too the shareholders were complaining simply that the value of their stock had diminished.

(c). *Nordberg v. Lord, Day, & Lord.* Shareholders complained that as the result of the illegal racketeering activities of the Defendants they were suffering loss as to the diminution in value of their shares.

The Petitioner by the conduct of the Respondents either jointly or severally has suffered as follows:

(a). He no longer has any interest in The Kuntz Company as it was put into liquidation in July 1986.

(b). The Kuntz Company was stripped of its assets to the benefit of the Respondents subsequent to the said Company being forced to sell at a price advantageous to the Respondents.

(c). The loss of such voting rights and any other rights or benefits that any shareholder in the said Kuntz Company was entitled to enjoy. e.g. Discount.

Furthermore and in addition to the above it is contended on behalf of the Petitioner that when the Winters National Bank and Trust Co. of Dayton, Ohio (the fourth named Respondents), were appointed Trustees of the Estate of the Last Will and Testament of William Kuntz Senior, there existed between the Petitioner and the said fourth Respondents a "special relationship contractual or otherwise than that owed to the corporation." In this case The Kuntz Company. (*Vincel v. White Motor Corp.*, 521 F. 2d 1113, 1118 2nd Circ. 1975, reaffirmed in *Nordberg v. Lord, Day, & Lord* 107 FRD 692, 698). In this case The Kuntz Corporation. This Fiduciary relationship was breached and hence entitles the Petitioner to bring this action.

2. *The Petitioner in his capacity as a Shareholder in The Peter Kuntz Company is able to bring any action to remedy an alleged injury to the said Corporation by virtue of the Respondents being in breach of the provisions of the Racketeer Influenced and Corrupt Organizations Act 18 USC sections 1961-68.*

The Petitioner repeats the arguments set out in paragraph 1 above. Under the provisions of Rule 23.1 Rules of Civil Procedure "the complainant must allege with particularity the efforts, if any, made by the plaintiff to obtain the action he desires from the directors or comparable authority and . . . . the reasons for his failure to obtain the action or for not making the effort". From the judgements of the Learned Judges from the Honourable Courts of First and Second instance below, they do not seem to have considered the import of those matters set out in the Petitioner's complaint at paragraph 106. This states as follows:

106.

> "That the Plaintiff has from time to time made oral and written requests upon the management of the companies and has dutifully attended each and every shareholders' meetings since 1981. Taking an active part in each meeting seeking to redress both in the Probate Administration of the Estate of his Grandfather and in other places and manners sought to correct the evils as presented here in this complaint".

Any further particularization of the Petitioner's action with regard redress would be available upon discovery when examination of the minutes of meetings attended by the Petitioner could be made. Additionally the Petitioner has on two previous occasions petitioned this Honourable Court with regard the conduct of the Winters National Bank and Trust Co., acting as trustees of the Last Will and Testament of William Kuntz Senior. Namely in the October Term 1983, and the October Term of 1986. The Petitioner relies on the matters set out in these two petitions in support of his arguments under this paragraph.

If this Honourable Court takes the view that the Petitioner has failed to satisfy the requirements of rule 23.1 it is submitted in the alternative that the reason for such a failure is that such "a demand is futile when the board's decision would have no relevance to the district court; no matter the board's decision, the district court will not defer to it" *Kaufman v. Safeguard Scientifics, Inc.*, 587 F.Supp 486, 489 (ED Pa 1984). The Petitioner would also seek to rely upon the doctrine in *Lewis v. Curtis* (671 F.2d 779 784 (3rd Cir.) 1982 which said "that the courts have to decide that the demand would have been if the majority of the board was involved in the disputed activity".

On the facts of the Petitioner's complaint it is clear from the nature and detail of the complaint that the majority of The Kuntz Company Board was involved in the disputed activity.

3. *The Petitioner as the Co-Executor of the Last Will and Testament of William Kuntz Senior had both capacity and a duty to bring any action to remedy an alleged injury to the Kuntz Corporation by the Respondents being in breach of the Racketeer Influenced and Corruption Acts. Failure so to act could make him liable to the beneficiaries under the said Last Will and Testament.*

The Petitioner having established the basis upon which he is able to bring the action against the Respondents in both his individual capacity and under the provisions of Rule 23.1 (para. 2 and 3 above), has an inherent duty to pursue the matter as an Executor. When an executor or trustee to any estate is appointed they are placed in a fiduciary position to see to it that the Will of the Deceased is executed. This includes a duty not only to the estate but its beneficiaries which must mean that the executors and trustees should seek to perpetuate the benefits of the Estate always acting in its best interest. The Peter Kuntz Company was a Private Company and it was clear that as such it was a family corporation. The Petitioner as a member of that family, and executor of the Will and a beneficiary of the same needed to ensure that the intention of the Will was executed in the best interests of the estate. As a matter of construction that can be placed upon the Last Will and Testament of the deceased the trust for sale which was relied upon by the Trustees could have only been meant to take place if it were in the "best interests of the Estate and its Beneficiaries". The Petitioner who was acting Bona Fides in believing that the disposal of the estate's assets were not in the "best interests" had a duty to act. To do nothing in full knowledge could be construed as aquiesence to the Respondents fraudulent acts. It is therefore submitted that it would be inequitable to exclude the Petitioner in this capacity acting in good faith to be able to bring an action to remedy alleged injury under the Racketeering Influenced and Corruption Acts.

4. *The Petitioner has fulfilled all the requirements of Rule 23.1 of The Federal Rules of Civil Procedure and is entitled to bring a derivative action against the Respondents.*

In bringing this action the Petitioner, fairly and adequately represents the interest of the other shareholders of the Peter Kuntz Company and/or the other beneficiaries of the last Will and Testament of the deceased William Kuntz Senior.

5. *Upon the facts of this case it is wrong in principle to allow a motion to dismiss on the basis that a derivative action cannot be maintained by a complaint acting Pro Se.*

Any person has a right to bring his own action and it is submitted on behalf of the petitioner (notwithstanding the argument to be put forward in the subsequent paragraph). In the circumstances of this case, it was wrong in principal for the Honourable Courts below to allow the respondents motion to dismiss the Petitioner's Complaint upon the basis of the doctrine in *Phillips v. Tobin*, 548 F.2d 408, (2nd Cir. 1976). Her Honour Judge Cedarbaum in allowing the Respondents' motion at first instance cited this case at page 412 as follows:

"the necessity for an attorney in a stockholder's derivative suit appears from the fact that it is a special type of proceeding. Unlike a personal suit, failure of the plaintiff to succeed in the action will result in a loss to the corporation. Likewise, any recovery will run directly to the corporation and not to the plaintiff."

This view was supported by the Court of Appeals however it does not seem to fit into any context of the facts of this case. The facts of the *Phillips v. Tobin* are totally different to the facts in this case. Here the matters principally complained of by the Petitioner throughout this case is that because of the actions of the Respondents either jointly or severally The Peter Kuntz Company no longer exists after being stripped of all its assets. In the *Phillips v. Tobin* case that company continued to exist.

The Petitioner in this case finds himself in a position where he is dispossessed of all interest in a company which no longer exists. How therefore can it be suggested by the learned judges in both the district court and the appeals court that a company which no longer exists may either gain or lose by the actions of the Petitioner? The only parties likely to gain or lose are the Petitioner and/or other possible stockholders of his class.

In the *Phillips v. Tobin* case the plaintiff voluntarily put himself forward as representing a particular class, the petitioner was placed in the position of having to carry out his duty as the executor and beneficiary of his grandfather's estate which happened to include the stocks in question. The court in its discussion (p. 411), relied to some extent on the case of *Cohen v. Beneficial Industrial Loan Corporation*, 337 US 541, 69 S.Ct. 1221 at 1226 (1949) and *Rose v. Bernard*, 396 US 531 (1970). Here it was said that:

> "In fact, it has been long settled that the derivative suit was an invention of the courts of equity which came to the relief of the stockbroker, who had no standing to bring a civil action at law against faithless directors and managers. Equity, however, allowed him to step into the corporation's shoes and to seek the right to restitution he could not demand on his own."

As a procedural devise to enforce the corporate claim since the corporation cannot appear itself without legal representation then the representative shareholder cannot appear without an attorney. Where the Petitioner's case differs substantially is that the action which he seeks to bring is one which involves a harm caused to him by the actions of the Respondents both jointly and severally. In his complaint he has pleaded (paragraphs 1 to 3) his Locus Standi as a plaintiff in the original complaint. The remedy which he seeks is totally different from that which the courts had to decide in both the *Phillips* and the *Cohen* case. Two particular grounds in the Petitioner's case as examples of this difference are as follows:

(a). The action that the Petitioner brings is not one which involves The Peter Kuntz Company and how it was managed

giving him any right that he would not have had either under statute or common law. He together with others have lost such benefits that they had as shareholders of The Kuntz Company by the conduct of the Respondents, who forced the sale of assets and then the ultimate liquidation of the company.

(b). Whilst the Petitioner initially caused the action against the Respondents to be lodged when he was acting Pro Se (which it is maintained he was at all times entitled to do) the advice of Counsel was sought and indeed such counsel's appearance was placed upon the record of the district court. Further by a letter dated 16th February 1987, to her Honour Judge Cedarbaum the Attorneys of the fourth named Respondents acknowledged and agreed to the Petitioner's Attorney Mr. Morton Robson being entered on the record. In the *Phillips* there was no such legal counsel to advise.

From these two factors alone the Petitioner's case is easily distinguishable from that of *Phillips* and it is hard to see upon which basis either of the Honourable Courts below were able to come to the conclusion that they did.

Returning to the equity proposition. It must be wrong in equity to restrict or prevent any complainants right to remedy by denying them access to the courts. What the Respondents seem to be doing successfully is to use procedure to prevent answering the substantive action. The court has to look at the case as a whole. It can thus be easily deduced that the wrongs complained of by the Petitioner, are matters of substantive law which he would in any event be entitled to persue. The Learned Judge in *Phillips v. Tobin* said at p. 411:

> "At the threshold, we recognize the long established principle that in the federal courts the parties have the right to plead and conduct their OWN cases". *Faretta v. California*, 422 US 806, 830. (1975).

Under Section 1654 of Title 28 of the United States Code expressly provides:

> "In all of the United States the parties may plead and conduct their OWN cases personally or by Counsel as, by the rules of such courts, respectively, are permitted to manage and conduct causes therein".

The case which has been brought by the petitioner is in his own right. The inheritance which gives rise to this action included shares and it could never have been the intention of the courts of equity to take away a right of remedy that he has in any event simply because that inheritance was shares in company that the Respondents stripped of its assets and forced into liquidation. It is furthermore contended that it is only by virtue of the fact that there were other shareholders that he has invoked rule 23.1 and therefore had to plead this matter as a derivative action. The Derivative action is not however his sole course of action. It must be remembered that The Kuntz Company unlike the other cited in cases relied upon by both courts below and the Respondents was a private company. Such being the case the Petitioner's position became one which required him to have to make this a derivative action as well as his OWN action. Finally it is submitted that in the Honourable Courts below applying equity in considering the respondents' motion to dismiss on the *Phillips v. Tobin* principle should have first considered the equitable principle:

> " . . . He who comes to equity must come with clean hands . . . "

Upon the basis that what the Petitioner has alleged is true (even in accepting that the courts at first and second instance were correct) there is some merit in the substance of the petitioner's case. The Respondents are delaying and avoiding the answering of the allegations being made. They seek to invoke a procedural devise that was introduced by equity to give access to the courts and not to deny it to the Petitioner.

6. *The Doctrine in the case of Phillips v. Tobin as applied by both the Federal District Court and the US Court of Appeals in this case is in direct conflict with Rule 11 of the Federal Rules of Civil Procedure and Rule 28 Of the US Court of Appeals Rules section 1654.*

In the preceding paragraphs I have dealt with the *Phillips* case in some detail which I seek not to repeat unless necessary. What the court in the *Phillips* case failed to consider was the provisions of Rule 11, which states as follows:

> "Every pleading, motion and other paper of a party represented by an attorney shall be signed by at least one attorney of record in his individual name, whose address shall be stated. A party who is not represented by an attorney shall sign his pleading, motion, or other paper and state his address. Except when otherwise specifically provided by rule or statute, pleading need not be verified or accompanied by an affidavit. The rule in equity that averments of an answer under oath must be overcome by the testimony of two witnesses or of one witness sustained by corroborating circumstances is abolished. The signature of the Attorney or party constitutes a certificate by him that he has read the pleading, motion, or other paper; that to the best of his knowledge, information and belief formed after reasonable inquiry it is well grounded in fact and is warranted by existing law, or a good faith argument for the extension, modification, or reversal of existing law, and that it is not imposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation. If a pleading, motion, or other paper is signed in violation of this rule, the court, upon motion or upon its own initiative, shall impose upon the person who signed it, a represented party, or both, an appropriate sanction, which may include an order to pay to the other party or parties the amount of the reasonable expenses incurred because of the filing of the pleading, motion, or other paper, including a reasonable attorney's fee."

Both courts in the Petitioner's case failed to take any cognisance of this rule in applying the *Phillips* judgement. This rule allows any person to enter and sign any pleading, to then rule that that person has no standing Pro Se does not take into consideration the clear meaning of this rule. The argument goes further if it is combined with the provisions of title 28, Section 1654 of the US Court of Appeals Rules which gives the statutory right for any person to conduct their OWN case personally or by counsel. The court in *Phillips* seems to be saying that a shareholder cannot act Pro Se in a derivative action under the requirements of Rule 23.1, even though he has a statutory right under section 1654 USCA. More importantly he is entitled under rule 11 to place before the court such pleadings and papers signed by him . . . . "that to the best of his knowledge, information and belief . . . it is well grounded in fact and is warranted by existing law or a good faith argument for the extention modification or reversal of existing law. . . . . "

The effect of *Phillips v. Tobin* is a Catch 22 situation in that is saying that Shareholder cannot bring an action Pro Se under rule 23.1 even if the complainant is seeking to modify or reverse existing law and acts in good faith. Thus closing the door for any change in this area for the ordinary man who is faced by such establishments as the Respondents with limitless resources and lawyers. This could not have been the intention of the courts of equity nor the legislature.

Under Rule 11 it is submitted on behalf of the Petitioner that the Respondents in filing their motion to have the Petitioner's original motion dismissed did so in the violation of this rule. The rule is precise. It can therefore be presumed that the Respondents having had the benefit of advise from experienced and competent counsel were aware of the rule. The Petitioner not being represented by counsel could not have had this knowledge presumed. It must therefore have been the duty of the court to bring this rule to the attention of the Petitioner which it did not!

The Respondents by their imputed knowledge of Rule 11 must have been aware (by reasonable inquiry) of the petitioner's right

or at least the obvious conflict which exists between the doctrine in the judgement of *Phillips v. Tobin* and Rule 11 but failed to advise the Court.

It must follow that they, the respondents have commenced this motion so as to interpose it for an improper purpose, in that they are seeking to harass, cause unnecessary delay and increase in the cost of litigation to the Petitioner. This conduct by the Respondents is in keeping with that behaviour upon which the Petitioner was seeking to rely in his initial complaint. Under rule 11 if this court is satisfied that the Respondents are in violation of this rule then the appropriate sanctions be applied.

7. *The Respondents have been given sufficient particulars of the actions alleged by the Petitioner in the honourable courts below alleging Fraud as required by rule 9(b) of the Federal Rules of Civil Procedure when alleging injury under the Racketeering Influenced and Corrupt Organization Act.*

It is a requirement of rule 9(b) that when Fraud is alleged it should be "stated with particularity". The petitioner's submission in this case is that the case which he brought against the Respondents alleging Fraud fulfilled the requirements of rule 9(b). The degree of particularity differs with the nature and facts of any particular case. It is ultimately for the court which is seized of the matter to decide whether or not the Complainant has sufficiently particularized the alleged fraud. The Respondents must be told of the precise nature of the complaint being made.

It is submitted that in this case the Petitioner has set out fully in his complaint that the Respondents had perpetrated a fraud under the Racketeer Influenced and Corrupt Influenced against The Peter Kuntz Company (a third party) which caused him loss. In *Alglegaert v. Perot*, 78 F.R.D. 427 (1978), the court ruled that

> "For the purpose of federal rule of civil procedure requiring specificity when pleading fraud, less particularity is required where plaintiff is not asserting that fraud was committed against him but against a

third party or where facts are peculiarly within the adverse party's knowledge."

The Petitioner's case falls into both categories of this case. Both the Federal District Court and the Court of Appeals in their judgements fail to make any comment upon the Respondents' arguments as to the pleading of fraud. Nevertheless the Petitioner is alert to this line of argument and submits:

(a). The complaint (albeit one which was drafted by the petitioner acting Pro Se) is an acceptable statement of facts upon which the pleading on information and belief was founded and pleads facts which give rise to the inference of fraud. It states with sufficient particularity the misconduct so as to have apprised the Respondents and to enable them to prepare their defense. *First Federal Savings & Loan Association of Pittsburgh v. Oppenheim, Appel, Dixon* 634, F. Supp. 1341 US District Court S.D. New York, (1986).

(b). When the court seeks to examine pleadings which purport to make allegations of fraud within the requirements of rule 9(b). Any such allegation must be accepted by the court as being true and must be read in a manner most favourable to the plaintiff. This is especially true when dealing with questions of materiality which, since they are "mixed questions of law and fact," require delicate assessments of the inferences a "reasonable shareholder" would draw from the sets of facts in this case and the significance of those inferences to him. *Joyce v. Joyce Beverages Inc.*, 571, F. 2d (1978), US Court of Appeals, Second Circuit when citing *TSC Industries, Inc. v. Northway, Inc.*, 438, 450, 96 St. Ct. (1976).

(c). The Petitioner in his original complaint is entitled to rely on conclusionary and general statements in his complaint because the alleged fraud was committed in connection with identified acts and omissions. The mere fact that he has pleaded in his complaint on information and belief does not warrant its dismissal. *Felton v. Walton & Co., Inc.*, 505 F.2d 557 (1974), US. Court of Appeals, Second Circuit.

What can be drawn from this submission is that should this Honourable Court deem it necessary in the full context of this Petition based upon the matters in the Honourable Courts below, the Petitioner's case was adequately pleaded.

Finally it is necessary to bring to the court's attention that in seeking to place before the court a complaint that was adequately pleaded the petitioner found some difficulty in reconciling the requirements of rule 9(b) and rule 8(e). The former rule required sufficient particularity whilst the latter asks that pleadings are "Concise and Direct," this was also a matter discussed in the case of *Felton v. Walton.*

Wherefore petitioner respectfully prays the writ issue.

Benjamin V. R. Conlon, Esq.

APPENDIX

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the 6th day of January, one thousand nine hundred and eighty-eight.

PRESENT:

Hon. James L. Oakes,
Hon. Lawrence W. Pierce,
Hon. George C. Pratt,
Circuit Judges,

William Kuntz, III,
Appellant,

v. 87-7584

The Shawmut Bank of Boston; The First National Bank of Cincinnati; The Central Trust Company, N.A.; Society Bank; Merchants National Bank & Trust; Bank One Dayton N.A.; Merrill Lynch, Pierce, Fenner & Smith, Inc.; and Jane or John Does, 1-299,
Appellees.

ORDER

William Kuntz, III, pro se, appeals an order of the United States District Court for the Southern District of New York, Miriam Goldman Cedarbaum, Judge, dismissing his complaint for lack of standing. We affirm.

Lack standing to maintain an individual action for recovery as the only injury alleged in his complaint is the diminution of the value of his stock in the Peter Kuntz Company. *Vincel v. White Motor Corp.*, 521 F.2d 1113, 1118 (2d Cir. 1975); *Nordberg v. Lord, Day & Lord*, 107 F.R.D. 692, 698 (S.D.N.Y. 1985).

Similarly, Kuntz, as a shareholder suing in his own right, cannot bring an action to remedy an alleged RICO injury to a corporation, *Rand v. Anaconda-Ericsson, Inc.*, 794 F.2d 843, 849 (2d Cir.), *cert. denied*, 107 S. Ct. 579 (1986); *Warren v. Manufacturers Nat'l Bank*, 759 F.2d 542 (6th Cir. 1985); *Nordberg*, 107 F.R.D. at 698-700.

Kuntz also cannot maintain a derivative action on behalf of the Peter Kuntz Company. Notwithstanding the liberal reading we accord pro se complaints, *Haines v. Kerner*, 404 U.S. 519, 520 (1972) (per curiam), appellant failed to comply with the requisite pleading requirements of Rule 23.1 of the Federal Rules of Civil Procedure. Moreover, a pro se plaintiff cannot maintain a derivative action. *Phillips v. Tobin*, 548 F.2d 408, 411 (2d Cir. 1976).

Having dismissed the federal claims, the district court properly found that there was no basis for pendent jurisdiction over the state claims.

Accordingly, we affirm the order dismissing the complaint.

/s/ James L. Oakes
James L. Oakes,

/s/ Lawrence W. Pierce
Lawrence W. Pierce

/s/ George C. Pratt,
George C. Pratt

Circuit Judges.

N.B. This summary order will not be published in the Federal Reporter and should not be cited or otherwise relied upon in unrelated cases before this or any other court.

Issued as mandate: January 28, 1988

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
----------X

WILLIAM KUNTZ III,

Plaintiff,

—against— 86 Civ. 6771 (MGC)
OPINION

THE SHAWMUT BANK OF BOSTON, THE FIRST NATIONAL BANK OF CINCINNATI, THE CENTRAL TRUST BANK, SOCIETY BANK, MERCHANTS NATIONAL BANK & TRUST CO., BANK ONE DAYTON, N.A., MERRILL, LYNCH, PIERCE, FENNER & SMITH, INC. and JANE OR JOHN DOES, 1-299,

Defendants.
----------X

APPEARANCES:

WILLIAM KUNTZ, III
Plaintiff *Pro Se*
P.O. Box 625
Rhinebeck, New York 12572-0625

SCHULTE ROTH & ZABEL
Attorneys for Defendant
Shawmut Bank of Boston
900 Third Avenue
New York, New York 10022

By: John S. Martin, Jr., Esq.
Stewart A. Pomerantz, Esq.
Donald Rosenthal, Esq.

BOYLE, VOEGLER & HAIMES
Attorneys for Defendants First
National Bank of Cincinnati,
The Central Trust Co., N.A. and
Merchants National Bank & Trust Co.
30 Rockefeller Plaza
New York, New York 10112

By: Michael J. Levin, Esq.
Steven Anderson, Esq.

THOMPSON, HINE & FLORY
Attorneys for Defendant Society Bank, N.A.
1100 National City Bank Building
Cleveland, Ohio

By: S. Stuart Eilers, Esq.
Mark A. Gamin, Esq.

WHITMAN & RANSOM
Attorneys for Defendant Merrill
Lynch Pierce Fenner & Smith
200 Park Avenue
New York, New York 10166

By: Lee D. Unterman, Esq.

PAUL, WEISS, RIFKIND, WHARTON &
GARRISON
Attorneys for Defendant Bank One
Dayton, Ohio, N.A.
1285 Avenue of the Americas
New York, New York 10019

This is an action brought by plaintiff pro se against a number of banks, an investment firm and Jane and John Does 1-299, the directors and employees of the other defendants, for damages allegedly caused by defendants' acts in connection with the acquisition of two Ohio lending companies. Defendants have moved to dismiss the complaint.

Defendants' motions are granted for the reasons set forth below.

BACKGROUND

Plaintiff William Kuntz, III ("Kuntz") is a resident of New York. Plaintiff filed this suit on his own behalf and as a "member of the class of the shareholders of the common stock of the Peter Kuntz Company of Dayton, Ohio." The Peter Kuntz Company ("Kuntz Company"), founded by Kuntz's grandfather, was a privately held company engaged in the sale of building supplies. From the exhibits attached to plaintiff's papers, it appears that the assets of the Kuntz Company were acquired by Erb Lumber Company of Birmingham, Michigan in July 1986. At the end of 1986, Erb Lumber Company merged into Fredco, Inc. Plaintiff's exhibits show that he owned 234 preferred shares in the Kuntz Company. The certificate is dated September 26, 1978. It also appears that plaintiff owned common shares in the Kuntz Company.

This action arises from the liquidation of the Kuntz Company, the sale of the Kuntz Company's interest in the North Central Mortgage Company (North Central"), which plaintiff alleges is presently owned by defendant Shawmut of Boston ("Shawmut Bank"), and the sale of its interest in the Scioto Savings and Loan Association of Columbus, Ohio ("Scioto Savings") which, according to plaintiff, is now owned by defendant the Third National Bank & Trust Company, known as Society Bank. Plaintiff alleges that these two "enterprises" were the targets of racketeering activity on the part of defendants The First National Bank of Cincinnati ("First National"), The Central Trust Bank ("Central Trust"), Society Bank, Merchants National Bank & Trust Co. ("Merchants National"), Bank One Dayton, N.A. ("Bank One"), Merrill, Lynch, Pierce, Fenner & Smith, Inc. ("Merrill Lynch"),

and to a lesser extent, the Shawmut Bank, as well as various directors and employees of all the defendants, sued as Jane or John Does 1-299.

Plaintiff's complaint contains twelve "counts" which all relate to defendants' collective conspiracy to acquire the Kuntz Company's interests in North Central and Scioto Savings. Plaintiff contends that in 1981, the Kuntz Company owned a majority of the shares of North Central (¶ 41) and that North Central or the Kuntz Company owned the outstanding shares of Scioto Savings. North Central was in the business of issuing and collecting mortgages. Scioto Savings was in the business of lending money in the form of mortgages and in cross-lending and packaging mortgages to North Central (¶¶ 43, 46). Plaintiff alleges that the defendants conspired to force the Kuntz Company to sell its interests in North Central and Scioto Savings to Society Bank. (¶¶ 47, 48). In furtherance of this scheme, the banks, with the exception of Shawmut, are alleged to have engaged in a loan syndicate which made loans to North Central at much higher interest rates than North Central was able to charge on the loans and mortgages it issued. Plaintiff contends that defendants intended "to topple North Central Mortgage Company and remove it from the competition for mortgage loans in the region." (¶ 63). Plaintiff also alleges that by taking advantage of the discrepancy in interest rates and by threatening the Kuntz Company with bankruptcy proceedings, defendants forced the Kuntz Company to sell its interests in North Central and Scioto Savings to Society Bank. (¶ 73). Plaintiff contends that these acts by defendants created an "artificial crisis" in the management of North Central, the Kuntz Company and Scioto Savings, which enabled defendants to purchase from the Kuntz Company its holdings in North Central and Scioto Savings. (¶ 75). As a result, the Kuntz Company was forced into liquidation in July 1986, "at almost a total loss to plaintiff and to the class of plaintiff shareholders of which William Kuntz, III is the class representative." (¶ 76). These events constitute plaintiff's first "count" arising under RICO and also form the basis of the other eleven counts.

Count II also arises under RICO. It alleges that defendants, with the exception of Shawmut Bank, through fraud and duress, used wire transfers of funds in furtherance of their scheme.

Count III alleges tht Merrill Lynch engaged in excessive trading in North Central's mortgage portfolio and caused North Central to engage in needless risks. Plaintiff also asserts that Merrill Lynch, together with all the defendants except Shawmut Bank, violated a "number of the securities laws" including "10b-5 and 10b-16" by improperly trading in disregard of the needs and objectives of North Central. This trading was allegedly carried out to further "the racketeering goals of profiting at the expense of the 'Enterprise' ". (¶ 98).

Counts IV and V allege that Bank One, which was the trustee of William Kuntz Sr.'s estate, together with all the defendants except Shawmut Bank, breached its fiduciary duty by using confidential information obtained from the Kuntz Company for its own financial benefit, and to the detriment of the Kuntz Company and the two "enterprises."

Count VI alleges that all defendants except Shawmut Bank breached unspecified contracts with the "Enterprises" and induced other persons to breach contracts with North Central. Count VII alleges that defendants induced others and each other to breach their fiduciary duties.

Count VIII alleges that all defendants except Shawmut Bank, in furtherance of their racketeering scheme, aided and abetted Society Bank in its efforts to acquire Scioto Savings. In order to accomplish this, defendants, through Society Bank, allegedly caused false and misleading 10-K annual reports to be mailed and mailed false statements to the Securities and Exchange Commission. (¶¶ 128,129).

Count IX alleges that all defendants conspired to "spirit away" plaintiff's property and to cause injury to the business and financial interests of the plaintiff shareholders of the Kuntz Company.

Count X alleges that defendants, by investing in each other, schemed to enable Third National Bank to invest in the purchase of North Central and that as a result of the investment, North Central, which is now owned by Shawmut Bank, has assets in excess of $1.5 billion, which has resulted in substantial earnings to defendants.

Count XI alleges that all defendants schemed to bring about the "dismemberment" of North Central, Scioto Savings and the Kuntz Company at the expense of the plaintiff.

Count XII simply alleges that defendants were directed, controlled and advised to perform the will of their Directors, the John and Jane Doe defendants.

Plaintiff seeks to have this action certified as a class action pursuant to Rules 23 and 23.1 of the Federal Rules of Civil Procedure and seeks damages of up to $1.62 billion as well as other relief.

DISCUSSION

Defendants' main objective to this lawsuit is plaintff's lack of standing. The only injury which plaintiff alleges he personally suffered is the decline in value of his shares in the Kuntz Company. Plaintiff has not alleged that he was a shareholder of either North Central or Scioto Savings. The relief he seeks all relates to the alleged wrongdoing of the defendants in connection with the acquisition and sale of two companies once owned by the Kuntz Company.

A shareholder of a company has no standing to bring an action on his own behalf when the injury of which he complains is to the corporation and the only harm to the shareholder is a diminution in the value of his shares resulting from the harm to the corporation. When that is the case, the wrong, as well as the right to sue, belong to the corporation. *Kauffman v. Dreyfus Fund*, 434 F.2d 727 (3rd Cir. 1970), *cert. denied*, 401 U.S. 974 (1971); *Nordberg v. Lord, Day & Lord*, 107 F.R.D. 692 (S.D.N.Y. 1985).

The claims that plaintiff seeks to raise in this case are very similar to those asserted by the plaintiffs in *Rand v. Anaconda-Ericcson, Inc.*, 794 F.2d 843 (2d Cir.), *cert. denied*, 107 S. Ct. 579 (1986). In *Rand*, shareholders of Teltronics Services, Inc., a bankrupt distributor of telephone equipment, sued Teltronics' principal creditor and supplier alleging violations of Section 10(b) of the Securities Exchange Act, antitrust violations and RICO violations. Plaintiffs alleged that defendants' activities drove

Teltronics into bankruptcy. The court refused to permit the plaintiffs to proceed with any of their claims. With respect to plaintiffs' securities law claims, the court stated: "Plaintiffs' claim is based on a virtually limitless legal theory that would convert any fraudulent conduct resulting in bankruptcy into securities fraud." *Id.* at 848. The court also dismissed plaintiffs' RICO claims on the ground that plaintiffs had no standing because the legal injury, if any, was to the firm, and the decrease in value of plaintiffs' shares merely reflected a decrease in the value of the firm. *Id.* at 849.

I need not address the pendent claims of breach of contract and breach of fiduciary duty since, in the absence of a proper claim arising under federal law, I can not exercise pendent jurisdiction to consider the related state claims.

The injury that plaintiff alleges here is an indirect injury which he suffered because of his ownership interest in the Kuntz Company. Assuming for the purpose of deciding these motions that the events as alleged in the complaint are true, the injuries of which Kuntz complains were inflicted on the Kuntz Company. The fact that the events may have destroyed the value of his shares does not bestow on him a right to sue on his own behalf to recover damages. *See Papilsky v. Berndt*, 466 F.2d 251 (2d Cir.), *cert. denied*, 409 U.S. 1077 (1972).

The claims plaintiff seeks to raise here can be redressed only by an action brought by the corporation or by a shareholder's derivative suit. In order to qualify as a shareholder's derivative action, the complaint must comply with the special provisions set out in Rule 23.1 of the Federal Rules of Civil Procedure. The complaint must be verified and must allege "that the plaintiff was a shareholder . . . at the time of the transaction of which he complains" and "that the action is not a collusive one to confer jurisdiction on a court of the United States which it would not otherwise have." The complaint must also allege "with particularity the efforts, if any, made by the plaintiff to obtain the action he desires from the directors or comparable authority and . . . the reasons for his failure to obtain the action or for not making the effort." Furthermore, a derivative action may not be

maintained if it appears that the plaintiff does not fairly and adequately represent the interests of the shareholders in enforcing the right of the corporation.

In *Phillips v. Tobin*, 548 F.2d 408 (2d Cir. 1976), the court noted that in a shareholder's derivative suit, the substantive right belongs to the corporation, not the shareholders. Since a corporation may not appear except through an attorney, the court reasoned that, likewise, a representative shareholder may not appear except through an attorney. The court also noted that:

> The necessity for an attorney in a stockholder's derivative suit appears from the fact that it is a special type of proceeding. Unlike a personal suit, failure of the plaintiff to succeed in the action will result in a loss to the corporation . . . Likewise, any recovery will run directly to the corporation and not to the plaintiff.

Id. at 412.

Thus, under the law of this Circuit, plaintiff cannot maintain a shareholder's derivative suit without the assistance of counsel. Furthermore, the complaint plaintiff filed to commence this action fails to meet the pleading requirements of Rule 23.1.

Defendants' motions to dismiss are granted, and plaintiff's complaint is dismissed.

SO ORDERED.

Dated: New York, New York
May 12, 1987

/s/Miriam Goldman Cedarbaum

MIRIAM GOLDMAN CEDARBAUM
United States District Judge

Appendix F—Petition for a Writ of Certiorari to the Court of Appeals for the Second District—Montgomery County Ohio, in Kuntz vs. Winters National Bank and Trust Co.

No. -

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

In the Matter of the Estate of
WILLIAM KUNTZ

WILLIAM KUNTZ, III

—v.—

WINTERS NATIONAL BANK AND TRUST COMPANY, ET AL.

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS FOR THE SECOND DISTRICT—MONTGOMERY COUNTY, OHIO

WILLIAM KUNTZ, III
Pro Se
11 N. Pearl Street 702
Albany, New York 12207
(518) 434-1990

(For Further Appearances See Reverse Side of Cover)

JAMES T. LYNN, JR.
Attorney for the Estate
The Old Post Office
120 West Third Street
Dayton, Ohio 45402-0910
(513) 224-1981

ROBERT B. CREW
JOSEPH P. BUCHANAN
Attorneys for Winters National Bank
And Trust Company
2580 Winters Bank Tower
Dayton, Ohio 45402
(513) 223-6211

THOMAS H. PYPER
Attorney for Paul W. Heintz
2100 First National Bank Plaza
Dayton, Ohio 45402
(513) 223-6211

QUESTIONS PRESENTED FOR REVIEW

1. That the appellant, here petitioner William Kuntz III, a beneficiary to the estate and the displaced co-executor has preserved his rights as to the adverse decisions of the probate court by appeals of those adverse decisions and is thus not barred from the relitigation of any proper claim in federal court.

2. That the appellant, here petitioner William Kuntz III, is not conclusively bound by the decision of the state probate court as to federal estate tax controversy where such decisions have been obtained by the fraud and collusion of the defendant(s), TRUSTEE, WINTERS NATIONAL BANK AND TRUST COMPANY together with others.

TABLE OF CONTENTS

	Page
Questions Presented for Review	i
Table of Contents	ii
Table of Authorities	iii
Statement of Grounds for Jurisdiction	1
Statement of the Case	2, 3
Argument	4, 5

TABLE OF AUTHORITIES

Commissioner of Internal Revenue, Petitioner v. Estate of Herman Bosch, Deceased 387 US 456, 18 L.Ed.2d 886, 87 S.Ct.1776 .....

Federated Department Stores, Inc., et al., Petitioners, v. Marilyn Moitie and Floyd R. Brown, Etc. 452 U.S. 394, 69 L.Ed. 103, 101 S.Ct.2424 .....

Second National Bank of New Haven, Petitioner v. United States, 387 US 456, 18 L.Ed. 886, 87 S.Ct.1776 .....

STATEMENT OF GROUNDS FOR JURISDICTION

1. The decision of the Probate Court rendered on 19th of May, 1983 which will be included in the supplemental index.

2. The decision for the Court of Appeals rendered on the 26th of July, 1986 which will be included in the supplemental index.

3. The decision of the Supreme Court of Ohio declining jurisdiction rendered on October 1, 1986 which will be included in the supplemental appendix.

STATUTORY PROVISIONS

Internal Revenue Code

PRECEDENT CASE LAW

Erie R. Co. v. Tompkins 301 F.2d 231.

STATEMENT OF THE CASE

This is the second petition for a writ of certiorari from the administration of the estate of William Kuntz, Sr. late of Dayton Ohio, the first being 465 U.S. 1080, 79 L.Ed.2d 763, 104 S.Ct.1443 rehearing denied 467 U.S. 1257, June, 1984. The appeal stems from the second accounting of the present administrator, Winters National Bank and Trust Company to the Probate Court of Montgomery County, Ohio, In that accounting: the administrator sets forth tax payments of some $500,000, fee payments to itself and others of some $100,000 and sales of shares of closely held stock of the Peter Kuntz Company of Dayton Ohio and its subsidiaries without appraisal.

It is admitted by direct testimony in a hearing before a visiting judge that there were more favorable tax treatments available to the estate than those used by the administrator, Winters National Bank and Trust Company, which would have reduced the federal estate tax by a considerable amount.

It was further admitted that the fee's submitted and approved by the now retired probate judge was done on the same day and without notice of any kind.

It was further put into evidence that shares of stock in the estate were sold without appraisal back to the Peter Kuntz Company for whom the other co-executor, now resigned, in favor of Winters National Bank and Trust Company, was employed.

It was admitted that the estate of William Kuntz, Sr. did own the single largest block of stock of the common shares of the Peter Kuntz Company.

It was established that the valuable residential real estate of the deceased was sold on the first offer, accepted in one day and that the estate accepted a mortgage at a low rate of interest.

It was presented that a large portfolio of tax exempt bonds was sold at well below face value.

It was established that the trustee-administrator lent funds held in trusts for the payment of federal estate taxes to the estate for the payment of it's fees and the fees of it's counsel among others.

It was established that the trustee-administrator together with counsel for the trustee-administrator did participate in the sale of the mortgage company and saving and loan of whom the deceased was chairman, at a loss to the estate and the Peter Kuntz Company, and that included in the sharing of some $13,000,000 in wire transfer payments of loan payments from The Third National Bank And Trust Company.

ARGUMENT

The petitioner for certiorari should be granted on a basis of individual justice. In preparing for the filing of the petition I, William Kuntz III, did review the index of cases of the Supreme Court from the early 1920's through the present and with care those cases involving succession and estate taxes. It is quite clear that the court no longer cares to hear probate matters to any great extent with the recent exception of the estate of Howard Hughes.

Civil and criminal rights have for the most taken the docket of court and in effect left little consideration for property rights and even less for those who might obtain property by inheritance.

This may be property so, even our constitution speaks to the distaste for foreign titles of nobility, which brings to mind vast transactions, keeping segments of the populace aloof from the general public.

This is not yet a tax case, petitioner does not complain of the conduct of the government in collection of estate tax, even though the tax rate on this estate is the highest in the last several years. His complaint is directed to the conduct of the trustee, a national bank, whose charter and trust powers flow from the federal government.

Petitioner has complained that the trustee has ordered the affairs of this estate to suit its goals, for it's ease of administration. When confronted with the direct question as to tax *overpayment* the response goes "Oh, well we were too late to correct that" not too late to collect $100,000 in fees for itself and the cronies however.

It is not too hard to comprehend that a large national bank whose business in part is to administrate large numbers of estates has a great deal of influence in the probate court, much more that those who only have one or two matters come to court in a lifetime, thus mischief is given root and as in this case

gives rise to an unaltered mind-set that the affairs of estates may be ordered to gain a profitable business for the bank, further that a probate bar will be nurtured and rush to curry favor of the bank doing what a general practitioner would avoid. Those charged in the federal government with overseeing the conduct of banks and correcting the wrongdoings that exist are so cozy with their charges that all they presently seem to do is keep count of the banks that fail, and employ large numbers of signpainters to reletter signs of failed institutions to newer institutions which in turn wait their own demise.

The precept of integrity and prudent administration seems to have been lost, the court may take notice that the Peter Kuntz Company of Dayton, Ohio of which the bulk of the estate was retained in the form of common stock has now failed and gone into liquidation at an almost total loss to appellant.

What petitioner seeks is the just remand and review of the conduct of the trustee-administrator and the chance to recover a substantial overpayment of federal estate tax without further delay.

Respectfully submitted,

WILLIAM KUNTZ III
Pro Se

Albany, New York
December 29, 1986

Appendix G—Supplemental Appendix in Kuntz vs. Winters National Bank and Trust Co.

No. -

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

In the Matter of the Estate of
WILLIAM KUNTZ

WILLIAM KUNTZ, III

—v.—

WINTERS NATIONAL BANK AND TRUST COMPANY, ET AL.

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS FOR THE SECOND DISTRICT—MONTGOMERY COUNTY, OHIO

SUPPLEMENTAL APPENDIX

WILLIAM KUNTZ, III
Pro Se
11 N. Pearl Street 702
Albany, New York 12207
(518) 434-1990

(For Further Appearances See Reverse Side of Cover)

JAMES T. LYNN, JR.
Attorney for the Estate
The Old Post Office
120 West Third Street
Dayton, Ohio 45402-0910
(513) 224-1981

ROBERT B. CREW
JOSEPH P. BUCHANAN
Attorneys for Winters National Bank
And Trust Company
2580 Winters Bank Tower
Dayton. Ohio 45402
(513) 223-6211

THOMAS H. PYPER
Attorney for Paul W. Heintz
2100 First National Bank Plaza
Dayton. Ohio 45402
(513) 223-6211

Dated: January 23, 1987
New York City, New York

INDEX TO SUPPLEMENTAL APPENDIX

	Page
Entry - Supreme Court of Ohio	A-1
Final Entry - Court of Appeals of Montgomery County, Ohio	A-2
Opinion - Court of Appeals of Montgomery County, Ohio	A-3
Order - Probate Court Division Common Pleas Court, Montgomery County, Ohio	A-6
Findings of Fact Conclusions of Law - Probate Counrt Division, Common Pleas Court, Montgomery County, Ohio	A-9
Final Account of Co-Executors	A-14
First Account of Winters Bank	A-17
Second Account of Winters Bark	A-20
Receipt and Disbursement of Co-Executor	A-23
Receipt of Winters Bank	A-25
Application for Allowance of Fees	A-29
Order for Allowance of Fees	A-33
Excerpts of Testimony	
William Kuntz III - p. 27 - Vol. I	A-35
William Kuntz, III - p. 35 - Vol. I	A-36
William Kuntz, III - p. 46 - Vol. I	A-37

Page

William Kuntz, III - p. 28, 29 - Vol. II A-38

William Kuntz, III - p. 30 - Vol. II A-38

Paul W. Heintz - p. 69 - Vol. I A-40

Paul W. Heintz - p. 94 - Vol. I A-41

Paul W. Heintz - p. 126 - Vol. I A-41

William Cohen - p. 87 - Vol. II A-43

William Cohen - p. 94 - Vol. II A-44

William Cohen - p. 95 - Vol. II A-44

William Cohen - p. 98 - Vol. II A-46

Gerald Naugle - p. 110 - Vol. II A-47

Gerald Naugle - p. 111 - Vol. II A-48

Trace Swisher - p. 173 - Vol. II A-49

Trace Swisher - p. 183 - Vol. II A-50

Trace Swisher - p. 192 - Vol. II A-50

Robert Crew - p. 198, 199, 200 - Vol. II A-52

Robert Crew - p. 204 - Vol. II A-54

Assignment of Mortgage A-57

IRS Form 843 - Claim A-59

A-1

The Supreme Court of Ohio

Columbus

1986 TERM

To wit: October 1, 1986

In re Estate of :
William Kuntz. : Case No. 86-649

: ENTRY

Upon consideration of the motion for an order directing the Court of Appeals for Montgomery County to certify its record it is ordered by the Court that said motion is overruled.

COSTS:

Motion Fee, $20.00, paid by William Kuntz, III.

FOR YOUR INFORMATION ONLY
NOT FOR FILING

/s/ Frank D. Celebrezze
FRANK D. CELEBREZZE
Chief Justice

I, James Wm. Kelly, Clerk of the Supreme Court of Ohio, do hereby certify that the foregoing order was correctly copied from the records of said Court, to wit, from the Journal of this Court.

IN WITNESS WHEREOF, I have hereunto subscribed my name and affixed the seal of said Supreme Court, this date _____.

JAMES WM. KELLY CLERK

/s/ Daniel J. Crowley DEPUTY

A-2

In the

Court of Appeals of Montgomery County, Ohio

IN THE MATTER OF: :

THE ESTATE OF WILLIAM KUNTZ, SR. : CASE NO. CA 8637

Deceased ..... FINAL ENTRY

Pursuant to the opinion rendered by this court on the 26th day of February, 1986, the judgment of the trial court is affirmed.

/s/ Joseph D. Kerns
JOSEPH D. KERNS, Judge

/s/ William H. Wolff, Jr.
WILLIAM H. WOLFF, JR., Judge

/s/ R.K. Wilson
RICHARD K. WILSON, Judge

cc: James T. Lynn
Thomas H. Pyper
Joseph P. Buchanan
James R. Kirkland

Filed
Court of Appeals
1986 Mar 3 PM12:29
Montgomery County

COURT OF APPEALS
SECOND APPELLATE DISTRICT

A-3

In the

Court of Appeals of Montgomery County, Ohio

Probate Division

Case No. CA 8637

In the Matter of the Estate of:

WILLIAM KUNTZ, SR., Deceased

OPINION

Rendered on the 26th day of February, 1986.

JAMES T. LYNN, 1400 One First National Plaza, Dayton, Ohio 45402
Attorney for Estate of William Kuntz, Sr., Deceased

THOMAS H. PYPER, 2100 One First National Plaza, Dayton Ohio 45402

JOSEPH P. BUCHANAN, 2580 Kettering Tower, Dayton, Ohio 45423
Attorney for Winters National Bank & Trust Co.

JAMES R. KIRKLAND, 518 - 111 West First Street, Dayton, Ohio 45402
Attorney for Appellant, William Kuntz, III

PER CURIAM:

The appellant, William Kuntz, III has appealed from the order of the Montgomery County Court of Common Pleas, Probate Division, overruling his objections to the second partial account

A-4

filed by appellee, Winters National Bank & Trust Co. n.k.a. Bank One, Administrator do bonis non with will annexed.

In a prior appeal in case No. 7355 we rendered an opinion on March 19, 1983 affirming the order of the trial court removing the appellant as co-executor and accepting the resignation of the other co-executor. Many of the back ground facts in this case are set forth in our prior opinion. No useful purpose would be served in repeating those facts in this opinion.

On April 14, 1982, appellee filed a partial account encompassing the accounting period prior to March 25, 1982. Appellant filed no objections to this account.

On January 11, 1983, appellee filed a second partial account for the accounting period between March 26, 1982 and November 16, 1982. On February 22, 1983, appellant filed 15 objections to the second account.

A hearing on the objections was conducted on April 19, and 20, 1983. On September 28, 1983, the Probate Division overruled 14 objections and sustained one objection which is not pertinent to any of the issues in this appeal.

The appellant has appealed asserting eight assignments of error.

The first is:

THE COURT WAS IN ERROR FOR LIMITING THE SCOPE OF THE OBJECTIONS TO THE ACCOUNT

Appellant states that the trial court erred in sustaining appellee's objection to matters regarding the first account contending that he did not receive notice of the filing of the first account.

The record reflects the fact that the appellant at least had notice of the first account when he received notice of the filing of the second account designated "Fiduciary's Account, Second."

We find no abuse of discretion by the trial court in limiting the scope of appellant's examination to the second account. The first assignment of error is overruled.

In the appellant's last seven assignments of error he in effect contends that the findings of facts and order of the trial court are against the weight of the evidence.

We think the record discloses sufficient credible evidence to support the order of the trial court overruling the appellant's exceptions to the second account. *C.E. Morris Co.* v. *Foley Construction Co.* (1978), 54 Ohio St. 2d 279. *Seasons Coal Co. v. Cleveland* (1984), 10 Ohio St. 3d 77.

The judgment is affirmed.

KERNS, J., WOLFF, J., AND WILSON, J., CONCUR.

Filed
Court of Appeals
1986 Feb 26

Montgomery
County

A-6

In the

Common Pleas Court of Montgomery County, Ohio

Probate Division

Case No. 231191-300-183

In the Matter of the Estate of:

WILLIAM KUNTZ, Deceased

ORDER

This cause came on to be heard on the objections to partial account filed herein by William Kuntz, III. The Court, upon consideration of the evidence adduced at the hearing on said objections on April 19 and 20, 1983, and post hearing memorandums, submitted by counsel for the parties, entered its Findings of Fact and Conclusions of Law herein on June 13, 1983, finding that the objections to the account, with the exception of Objection No. 10, were without merit and further finding that the fiduciary's second account filed January 1, 1983, to be in all respects, correct and the same was ordered approved, except for Objection No. 10.

It is, therefore, by the Court, ORDERED that the objections of William Kuntz, III to the second account be and the same are hereby overruled and said second account is hereby approved in all respects except for the objection set forth in Objection No. 10.

With respect to Objection No. 10, the evidence shows that William Kuntz, III has possession of the deceased's 1969 Lincoln automobile and a prior accounting shows said automobile

distributed to William Kuntz, III; however, the certificate of title to said automobile is in the name of the estate and has not been transferred to William Kuntz, III. It is, therefore, further ORDERED that the Winters National Bank and Trust Co., Administrator D.B.N. W.W.A. of the Estate of William Kuntz secure a duplicate certificate of title if the original cannot be found, execute an assignment thereof to William Kuntz, III and tender the assigned certificate of title to William Kuntz, III so that he may secure a new certificate of title in his name. It is further ORDERED that said fiduciary file its report herein that it has complied with the foregoing Order.

_____

JUDGE

APPROVED:

_____

JAMES R. KIRKLAND, ESQUIRE
Kirkland & Berger Co.
Suite 518
111 West First Street
Dayton, Ohio 45402

Attorney for William Kuntz, III

_____

JOSEPH P. BUCHANAN, ESQUIRE
Cowden, Pfarrer, Crew & Becker
2580 Kettering Tower
Dayton, Ohio 45423

Attorney for Winters National Bank and Trust Co.

JAMES T. LYNN, JR., ESQUIRE
Young, Pryor, Lynn & Jerardi
1400 One First National Plaza
Dayton, Ohio 45402

Attorney for the Estate of William Kuntz, Sr., deceased

THOMAS H. PYPER, ESQUIRE
Estabrook, Finn & McKee
1520 One First National Plaza
Dayton, Ohio 45402

Attorney for Paul W. Heintz

Filed

Sep 28, 1986
3:53 P.M.

Montgomery County

A-9

In the

Common Pleas Court of Montgomery County, Ohio

Probate Division

Case No. 231191-300-593

In the Matter of the Estate of:

WILLIAM KUNTZ, Deceased

FINDINGS OF FACT
CONCLUSIONS OF LAW

Objections to the partial Account have been filed by William Kuntz III and were heard April 19 and 20, 1983. Further the Court has the benefit of written agreements submitted by counsel for the parties.

The first five objections relate to the fees changed by the fiduciaries and their counsel. The fiduciaries fees, of course, are controlled by statute, except to the extent that extraordinary services may have been performed. Attorney fees are controlled by several factors including but not limited to the Courts guidelines and the attorneys record of time. It is the practice of this Court in the event of objection to fees, to set the matter for hearing and take evidence as to the reasonableness of the fees. The Court has now heard evidence as to the work accomplished and the time required for this work by each fiduciary and attorney involved. The work involved was complicated and was made moreso by the lack of cooperation by the Objector, Mr. Kuntz. The evidence was clear that extraordinary services were rendered, which were necessary, were valuable to the estate and that fees requested for the same are more than reasonable.

Separate written statements for fees have been submitted by Winters National Bank, Mr. Heintz and Mr. Lynn which the Court hereby finds reasonable and are allowed as submitted.

OBJECTION NO. 6

Objector alleges that the deceased's real estate located at 4340 Delco Dell Road, Dayton, Ohio, was sold on terms and conditions that were not in the best interests of the estate or the trust beneficiaries. He alleges the sale price was insufficient and that the note and mortgage taken for the balance of the purchase price carried an interest rate several points under the market.

The Court has heretofore found that it was in the best interests of the estate that the property be sole.

The inventory and appraisement signed and filed by the Objector, while acting as a co-executor, stated the property had a fair market value of $165,000.00 in the early summer of 1980. The property was sold in the fall of 1981 for $175,000.00. The terms were $75,000.00 cash, with a note and mortgage for $100,000.00 carrying interest at 13% payable in four years with monthly payments of $1,000.00.

Objectors witness, Mr. McCosh, a licensed broker, testified that he was familiar with the area; that it was an expensive area; that sales in 1980 and 1981 were slow and very few properties sold during this time. On cross examination he agreed that mortgage loans were hard to get and that some reduction in the interest rates was one devise used during this period to stimulate and sell real estate.

The Court cannot find that either the price obtained for the property or the terms extended to the purchaser were against the best interests of the estate or trust beneficiaries.

OBJECTION NO. 7

The evidence was that the Administrator sold decedent's residence taking back a purchase money mortgage for $100,000.00 with interest at 13%.

Thereupon the mortgage was sold to the first in order to raise sufficient cash to pay taxes and expenses of administration. There is no question but that the transaction was in keeping with the fiduciary's powers. There is no evidence that the transaction was improper and in fact appears to have been necessary.

The Court finds this objection to have no merit.

OBJECTION NO. 8

Objector alleges that the Winters National Bank, Trustee, failed to consider splitting the property at 4340 Delco Dell Road prior to sale.

Testimony was that the house was situated on approximately 1.44 acres of land and appraised at $175,000.00. There is no evidence as to whether zoning restrictions would permit subdivision. There is no evidence as to whether such subdivision would detract from the appraised value.

The Court is of the opinion this suggestion is highly speculative and there is no evidence that subdivision would benefit the estate and in fact might prove detrimental.

OBJECTION NO. 9

Objector alleges that the Winters National Bank sold shares of stock belonging to the deceased without proper review.

The objections do not state and there is no evidence that any sales of shares of stock were a loss to the estate. The evidence was in fact that shares of the Peter Kuntz Company were unlisted and had no market value. They were, however, subject to a company resolution and agreement to purchase them at a stated price which the fiduciaries took advantage of. Objector, while acting as co-exectuor, failed to act in relation to the company resolution and offer and this was part of the basis for his removal.

The Court can find no loss to the estate and no basis for this objection.

A-12

OBJECTION NO. 10

Objector alleges that title to the deceased's 1969 Lincoln automobile has not been transferred to him as reflected by a prior accounting.

The evidence indicates a clerical error was made when the car was transferred from the name of the deceased to the estate. This had to do with the serial number. The real thrust of this objection appears to be that there has been unnecessary delay in transfer of the title.

The evidence shows that the car was shown as having been distributed to William Kuntz III in the final account of the co-executors. Winters was not charged with this asset.

The Court suggests that Winters expedite this matter by causing transfer to Mr. Kuntz.

OBJECTION NO. 11

Objector alleges Winters National Bank failed to avail itself of favorable tax treatment under IRS regulations, in that tax could have been deferred at a very low rate of interest.

The evidence revealed the estate did not qualify for deferred tax payment, as alleged by Objector, and further that even had it qualified, deferment would not have been wise since the interest rate on deferred taxes would have been far in excess of 4%.

OBJECTION NO. 12 AND 13

Objector alleges the account does not properly state interest and principal amounts held by the estate.

Testimony revealed that all cash held by the estate was invested and that the return was in excess of the Federal Bill rate. Evidence was presented as to the yield month by month during 1981.

The Court finds the accounting method to be satisfactory and that estate funds were properly invested at an adequate level of return.

OBJECTION NO. 14

Objector alleges the executor sold estate securities for no proper purpose.

The evidence is to the contrary. Sale of Peter Kuntz Company stock was necessary to repay a loan from the company to William Kuntz. The balance was used to pay taxes.

OBJECTION NO. 15

Objector alleges that Winters National Bank acted improperly as Trustee in the sale of certain securities to the detriment of the estate.

Evidence presented showed clearly that the transaction referred to by Objector had no relation to this estate or trust and that Winters National Bank was not acting as Trustee in any proceedings concerning sale of North Central Mortgage Company.

The Court finds this objection without merit.

In summary, except for Objection No. 10, the Court finds the Fiduciary's Second Account filed January 1, 1983, to be, in all respects, correct and the same is hereby ordered approved.

/s/ James B. West
James B. West, Judge

cc: Counsel of Record

A-14

PROBATE COURT OF MONTGOMERY COUNTY, OHIO

STATE OF: William Kuntz, Deceased

Case No. 231191 Docket 290 Page:

Approved:

Journal:

FINAL FIDUCIARY'S ACCOUNT

[For Executors and all Administrators]

The fiduciary offers an account of his trust, given below and on the attached itemized statement of receipts and disbursements, and accompanying vouchers. The fiduciary says that to his knowledge the account is correct, and asks that it be approved and settled.

[Check one of the following four paragraphs]

☐ This is a partial account. A statement of the assets remaining in the fiduciary's hands is attached.

☐ This is a final account. A statement of the assets remaining in the fiduciary's hands for distribution to the beneficiaries is attached.

☐ This is a distributive account, and the fiduciary asks to be discharged from his trust upon its approval and settlement.

☒ This is a final and distributive account, and the fiduciary asks to be discharged from his trust upon its approval and settlement.

[Complete if this is a partial account, or if one or more accounts have previously been filed in the estate] The period of this account is from

January 1, 1981 to April 30, 1981

[Complete if applicable] Accounts previously filed in the estate, the accounting periods, and the fiduciary and attorney fees paid for each period, are as follows:

Date Filed: March 4, 1981

Accounting Period: March 11, 1980 to Dec. 31, 1980

Fiduciary Fees Paid: $14,000.00

Attorney Fees Paid: $10,000.00

A-15

This account is recapitulated as follows:

RECEIPTS

Personal Property of decedant [not sold]		$932,210.41
Proceeds from redemption of Reading Pa Municipal Bond		20,000.00
Proceeds from sale of personal property		—0—
Real estate of decedent [not sold]		165,000.00
Proceeds from sale of real estate		—0—
Income		26,953.15
Other Receipts		—0—
Total receipts		$1,144,163.56

DISBURSEMENTS

Fiduciary fees [this accounting period]	$ —0—	
Attorney fees [this accounting period]	—0—	
Other administration costs and expenses	1,325.65	
Debts and claims against estate	—0—	
Ohio and federal estate taxes	—0—	
Personal property distributed in kind	500.00	
Real property transferred	—0—	
Other distributions to beneficiaries	15,340.00	
Other disbursements (Bank service charges	12.00	
Distribution to Winters National Bank as Administrator De Bonis Non With Will Ann.	$1,126,985.91	1,144,163.56

A-16

BALANCE REMAINING IN
FIDUCIARY'S HANDS . . . . . $ -0-

(s)

William Kuntz, III — Fiduciary — Paul W. Heintz

ENTRY SETTING HEARING AND ORDERING NOTICE

The Court sets at - o'clock .M. as the date and time for hearing the above account, and orders notice of the hearing to be given as provided by law and the Rules of Civil Procedure.

Date

Neal F. Zimmers, Probate Judge

A-17

PROBATE COURT OF MONTGOMERY COUNTY, OHIO

ESTATE OF: William Kuntz, Deceased

Case No. 231191 Docket 300 Page: 183

Approved: May 25, 1982

Journal: 964 245

FIDUCIARY'S ACCOUNT

–FIRST ACCOUNTING–

[For Executors and all Administrators]

The fiduciary offers an account of his trust, given below and on the attached itemized statement of receipts and disbursements, and accompanying vouchers. The fiduciary says that to his knowledge the account is correct, and asks that it be approved and settled.

[Check one of the following four paragraphs]

☑ This is a partial account. A statement of the assets remaining in the fiduciary's hands is attached.

☐ This is a final account. A statement of the assets remaining in the fiduciary's hands for distribution to the beneficiaries is attached.

☐ This is a distributive account, and the fiduciary asks to be discharged from his trust upon its approval and settlement.

☐ This is a final and distributive account, and the fiduciary asks to be discharged from his trust upon its approval and settlement.

[Complete if this is a partial account, or if one or more accounts have previously been filed in the estate] The period of this account is from

5/15/81 to 3/26/82

[Complete if applicable] Accounts previously filed in the estate, the accounting periods, and the fiduciary and attorney fees paid for each period, are as follows:

Date Filed: Accounting Period:

Fiduciary Fees Paid: Attorney Fees Paid:

A-18

This account is recapitulated as follows:

RECEIPTS

Personal Property of decedant [not sold]	$ 926,471.69
Proceeds from sale of personal property	1,669,400.14
Real estate of decedent [not sold]	165,000.00
Proceeds from sale of real estate	175,000.00
Income	96,536.44
Other Receipts	177,568.80
Total receipts	$3,209,977.07

DISBURSEMENTS

Fiduciary fees [this accounting period]	$	
Attorney fees [this accounting period]	10,000.00	
Other administration costs and expenses	15,670.80	
Debts and claims against estate	96,611.51	
Ohio and federal estate taxes	200,000.00	
Personal property distributed in kind		
Real property transferred		
Other distributions to beneficiaries	96,453.50	
Other disbursements	1,910,878.06	
Total disbursements	$	2,329,613.87
BALANCE REMAINING IN FIDUCIARY'S HANDS		$ 880,363.20

A-19

s/ _____ s/ _____

ATTORNEY Fiduciary VICE PRESIDENT

ENTRY SETTING HEARING AND ORDERING NOTICE

The Court sets at o'clock .M. as the date and time for hearing the above account, and orders notice of the hearing to be given as provided by law and the Rules of Civil Procedure.

_____ _____

Date Neal F. Zimmers, Probate Judge

A-20

PROBATE COURT OF MONTGOMERY COUNTY, OHIO

STATE OF: William Kuntz, Deceased

No. 231191 Docket 300 Page: 183

Approved:

Journal:

FIDUCIARY'S ACCOUNT

SECOND

[For Executors and all Administrators]

The fiduciary offers an account of his trust, given below and on the attached itemized statement of receipts disbursements, and accompanying vouchers. The fiduciary says that to his knowledge the account is correct, and asks that it be approved and settled.

[Check one of the following four paragraphs]

☒ This is a partial account. A statement of the assets remaining in the fiduciary's hands is attached.

☐ This is a final account. A statement of the assets remaining in the fiduciary's hands for distribution to the beneficiaries is attached.

☐ This is a distributive account, and the fiduciary asks to be discharged from his trust upon its approval and settlement.

☐ This is a final and distributive account, and the fiduciary asks to be discharged from his trust upon its approval and settlement.

[Complete if this is a partial account, or if one or more accounts have previously been filed in the estate] The period of this account is from

3/26/82 to 11/16/82

[Complete if applicable] Accounts previously filed in the estate, the accounting periods, and the fiduciary and attorney fees paid for each period, are as follows:

Date Filed: April 14, 1982 Accounting Period: 1st

Fiduciary Fees Paid: $0.00 Attorney Fees Paid: $10,000.00

A-21

...		...
Principal Cash on Hand		79.01
Income Cash on Hand		1.07
	$	880,363.20

This account is recapitulated as follows:

RECEIPTS		
Personal Property of decedent [not sold]	$	—0—
Proceeds from sale of personal property		470,247.76
Real estate of decedent [not sold]		—0—
Proceeds from sale of real estate		—0—
Income		36,891.89
Other Receipts		204,361.36
Total receipts		$1,591,864.21

DISBURSEMENTS		
Fiduciary fees [this accounting period]	$24,684.32	
Attorney fees [this accounting period]	24,114.51	
Other administration costs and expenses	47.63	
Debts and claims against estate	—0—	
Ohio and federal estate taxes	184,631.44	
Personal property distributed in kind	598,309.76	
Real property transferred	—0—	
Other distributions to beneficiaries	55,090.11	
Other disbursements	704,882.35	
Total disbursements	$	1,591,760.12
BALANCE REMAINING IN FIDUCIARY'S HANDS	$	104.09

A-22

WINTERS NATIONAL BANK AND TRUST, EXECUTOR OF THE ESTATE OF WILLIAM KUNTZ

BY: _____

_____ Attorney

Fiduciary
Vice President

ENTRY SETTING HEARING AND ORDERING NOTICE

The Court sets at o'clock .M. as the date and time for hearing the above account, and orders notice of the hearing to be given as provided by law and the Rules of Civil Procedure.

_____ _____

Neal F. Zimmers, Probate Judge

A-23

PROBATE COURT OF MONTGOMERY COUNTY, OHIO

STATE OF: William Kuntz, Deceased

Case No. 231191 Docket 290 Page:

RECEIPTS AND DISBURSEMENTS

[Attach to fiduciary's account]

Page _____ of _____ pages

Following is an itemized statement of receipts and disbursements by the fiduciary in the administration of his trust.

Item	Voucher No.	Value or Amount	Value or Amount
Assets remaining after Fiduciary's First Acctg.		$	$1,097,210.41
Income - Interest and Dividends			26,953.15
Redemption of Reading Pa Municipal Bond			20,000.00
TOTAL RECEIPTS			1,144,163.56
Winters National Bank, Trustee	1	7670.00	
Winters National Bank, Trustee	2	7670.00	
Harlan Monroe, household employee, (sick pay)	3	200.00	
Dayton Power & Light Company, service to 4340 Delco Dell Road	4	1125.65	

A-24

Distribution to Winters National Bank, as Administrator de bonis non with will annexed	5	1,126,985.91
William Kuntz, III. 1969 Lincoln		500.00
Bank service charges	---	12.00
TOTAL DISBURSEMENTS		1,144,163.56

* $1,097,210.41 is the value of the assets remaining after Fiduciary's First Account, reduced by the appraised value of the Reading Pa. Municipal Bond, which was redeemed during the second account period.

s/ Paul W. Heintz

William Kuntz, III,
Co-Executor

Paul W. Heintz,
Co-Executor

A-25

Case No. 231191

Docket: 290 Voucher No. 5

MONTGOMERY COUNTY PROBATE COURT

Dayton, Ohio May 18, 1981

RECEIVED OF Paul W. Heintz and William Kuntz, III, Co-Executors of the Estate of William Kuntz, the following assets.

Real estate located at 4340 Delco Dell Road	$165,000.00
Cash	38,121.22
Peter Kuntz Savings Participation Plan	25,000.00
6 U.S. Treasury Bills $60,000 face value - appraised value	39,987.69
7670 shares of the common stock of The Peter Kuntz Company - appraised value	613,600.00
1210 shares of the preferred stock of The Peter Kuntz Company - appraised value	54,450.00
1 share, Moraine Country Club	1,000.00
Stock in Peter Kuntz Company subsidiaries (appraised value) (See list attached)	5,912.00
Municipal Bonds (appraised value of those bonds not yet redeemed). See list attached.	183,915.00
TOTAL	$1,126,985.91

For: Distribution to Administrator De Bonis Non with Will Annexed

WINTERS NATIONAL BANK & TRUST COMPANY

By /s/ Trace B. Swisher

Trace Swisher, Trust Officer

A-26

Stock of Peter Kuntz Company subsidiaries

1 common share of Allen County Lumber & Supply Company	$300.00
1 common share of The Avenue Lumber & Supply Co.	300.00
1 common share of The Black River Lumber & Supply Co.	300.00
1 common share of The Brookville Lumber Company	300.00
1 preferred share of The Butler County Lumber Company	100.00
1 common share of Cambridge Lumber Company, Inc.	300.00
1 common share of Celina Lumber & Supply Company	300.00
1 preferred share of The Clark County Lumber Company	100.00
1 common share of The Fairborn Lumber Company	300.00
5 common shares of The Fostoria Lumber & Supply Co.	300.00
1 common share of The Klipstine Lumber & Supply Co.	300.00
1 common share of the Logan County Lumber & Supply Co.	300.00

A-27

Stock of Peter Kuntz Company subsidiaries
(continued)

1 common share of Losantville Lumber Company, In.c	300.00
19 common shares of Miller Kemper Lumber Company, Inc.	300.00
1 common share of North Central Mortgage Corporation	120.00
1 common share of North Central Mortgage Corporation	120.00
½ common share of North Central Mortgage Corporation	60.00
1 common share of St. Paris Lumber and Supply Co.	300.00
1 common share of The Peter Kuntz Lumber Company	300.00
1 common share of The Queen City Lumber Company	300.00
1 common share of The West Liberty Lumber Company	300.00
1 common share of The Western Ohio Development Company	300.00
1 common share of Union City Lumber & Supply, Inc.	300.00
1/9 common share of Scioto Savings Assn.	12.00
TOTAL	$5,912.00

A-28

MUNICIPAL BONDS

Lucas County Sanitary Bonds	$15,410.00
Oshkosh Wisconsin Bonds	17,500.00
Alabama Public Schools Bonds	25,761.00
Jefferson County Colorado Bonds	4,150.00
Hamilton County Ohio Bonds	8,580.00
Kettering Ohio Thorofare Bonds	8010.00
Akron, Ohio Street Improvement Bonds	8,375.00
Port Huron Michigan Lien Obligation	8,459.00
Celina Ohio Electric System Bonds	8,402.00
Pickering Schools Bonds	17,620.00
Maryland Department of Transportation Bonds	8,400.00
Ashland Ohio Waterworks Bonds	4,640.00
Pontiac Schools Bonds	8,372.00
Montgomery County Schools Bonds	7,902.00
Summit County, Ohio Bonds	8,202.00
Ohio Education Bonds	8,402.00
Cleveland County Park Bonds	7,300.00
Ohio Highway Series D Bonds	8,430.00
TOTAL	$183,915.00

A-29

In the

Common Pleas Court of Montgomery County, Ohio

Probate Division

Case No. 231191 Docket 290, Page 179

In the Matter of the Estate of:

WILLIAM KUNTZ, Deceased

APPLICATION FOR ALLOWANCE OF FEES

Winters National Bank and Trust Co., Administrator DBN WWA of the Estate of William Kuntz, deceased, files this Application for the Allowance of Fees to counsel and to a prior Executor and to the Administrator DBN WWA, and in support thereof, makes the following representations to the Court:

William Kuntz died testate on March 5, 1980, and on March 11, 1980, Paul W. Heintz and William Kuntz III were appointed Co-Executors of the Last Will and Testament of William Kuntz, deceased. Problems insued in the administration of the Estate, and it was impossible for the Executors to make progress in the administration of the Estate, and on September 11, 1980, Winters National Bank and Trust Co., as Trustee under Revocable Living Trust Agreement, entered into under date of July 1, 1975, and being the residuary devisee and legatee under the said Last Will and Testament, and for the protection of the beneficiaries of the Trust, filed application for the removal of the Executor, William Kuntz III. Shortly thereafter Paul W. Heintz tendered his conditional resignation as Co-Executor of the Estate. After hearing the matter, the Probate Court on May 1, 1981, ordered

the removal of William Kuntz III as an Executor and accepted the resignation of Paul W. Heintz and appointed Winters National Bank and Trust Co. as Administrator DBN WWA. Winters National Bank and Trust Co. was appointed Administrator DBN WWA on May 14, 1981 and proceeded with the administration of the Estate. In connection with the administration and the removal proceedings, this applicant secured the services of Cowden, Pfarrer, Crew & Becker as its counsel.

Working in conjunction with the counsel, the Administrator secured possession of the residence property owned by the deceased and secured a purchaser for the property and completed a sale of the property, completed previously contracted sale of preferred stock of the Peter Kuntz Company pursuant to existing agreements, disposed of other personal property, prepared, filed and paid Ohio Estate Tax and then notified Federal Estate Tax authorities that amendments were required in the Federal Estate Tax Return and thereafter, after lengthy negotiations, secured a reduction in certain values of Peter Kuntz Company stock owned by the deceased and as returned on the Federal Estate Tax Return, and secured a partial refund of tax paid. Clearance has been obtained and closing letters received in connection with the Federal Estate Tax and State Estate Tax. Applicant is in a position to conclude the administration of the Estate.

Applicant says that fees have been paid and claims have been made for fees by the following persons and in the following amounts:

Paul W. Heintz Executor Fees	$7,000.00
William Kuntz Executor Fees	$7,000.00
James T. Lynn Attorney's Fee	$10,000.00

The foregoing fees were paid by the prior Executors prior to the removal of William Kuntz III and the resignation of Paul W. Heintz.

Subsequent thereto, the following fee was paid:

James T. Lynn Attorney's Fee	$10,000.00

The following claims for fees have been filed with the Administrator:

Paul W. Heintz Executor's Fee	$ 4,684.32
Estabrook, Finn & McKee Attorneys for Paul W. Heintz	$ 6,935.16
James T. Lynn Attorney's Fee	$ 5,000.00
Winters National Bank and Trust Co. Administrator's Fee	$20,000.00
Robert B. Crew Attorney's Fee	$12,000.00

Applicant has attached hereto as exhibits the claims made for fees by the various claimants.

Applicant has computed the fees allowable by statute to an Executor or Administrator; they are in the sum of $30,000.00. Attorneys' Fees allowable by Probate Court without an order are computed in the sum of $28,500.00.

WHEREFORE, applicant Winters National Bank and Trust Co. Administrator DBN WWA prays for an order of this Court

A-32

authorizing the payment of the fees set forth herein and the allowance of such payments as a credit in the final accounting to be filed herein by the Administrator.

WINTERS NATIONAL BANK AND TRUST CO.

By _____
Administrator DBN WWA

_____

ROBERT B. CREW
Cowden, Pfarrer, Crew & Becker
2580 Winters Bank Tower

The undersigned, Winters National Bank and Trust Co. as Trustee under Revocable Living Trust Agreement entered into July 1, 1975, with William Kuntz and the sole legatee under the Last Will and Testament of William Kuntz hereby consents to the allowance of fees as set forth in the foregoing application.

Dated this 15th day of October, 1982.

WINTERS NATIONAL BANK AND TRUST CO.,
Trustee under Revocable Living Trust Agreement

By _____

Filed

Oct 20, 1982
2:03 P.M.

Montgomery
County

A-33

In the

Common Pleas Court of Montgomery County, Ohio

Probate Division

Case No. 231191 Docket 290, Page 179

In the Matter of the Estate of:

WILLIAM KUNTZ, Deceased

ORDER FOR ALLOWANCE OF FEES

This cause came on to be heard on the Application of Winters National Bank and Trust Co., Administrator DBN WWA of the Estate of William Kuntz, deceased, for an order of this Court authorizing the payment of Executors' and Administrator's fees and counsels' fees in connection with the administration of the Estate and on the statements of claimants for fees.

Upon consideration thereof, the Court finds that services have been rendered in the administration of the Estate as set forth by claimants, that the amount of the fees claimed is supported and that they are fair and reasonable in accordance with statements made by claimants, that payment thereof should be authorized and the administrator be entitled to claim credit for their payment upon the next accounting filed herein.

It is, therefore, ordered that the following fees be paid from the assets of the Estate by Winters National Bank and Trust Co. as Administrator DBN WWA of the Estate of William Kuntz, deceased;

Paul W. Heintz
Executor's Fee $4,634.32

Estabrook, Finn & McKee Counsel to Paul W. Heintz	$ 6,935.16
James T. Lynn Attorney's Fee	$ 5,000.00
Winters National Bank and Trust Co. Administrator's Fee	$20,000.00
Robert B. Crew Counsel to Administrator Attorney's Fee	$12,000.00

_____

Judge

_____

Attorneys for Administrator

Filed

Oct 20, 1982
2:03 P.M.

Montgomery
County

A. The federal estate tax return was prepared and filed by Mr. Heintz.

Q. Did you sign the return?

A. No.

Q. Was it presented for your signature?

A. No, not in form. We had two days of rather extended discussion whether to take an extension or whether to file the return I chose because of the valuation problems to seek an extension. It is possible under certain provisions of the Internal Revenue Code we might be able to elect what is a 6166A election, which might allow deferred payment of up to fifteen years at four percent interest to pay the estate tax obligation. These things I feel should be inquired into in a depth that would satisfy me and satisfy I.R.S. The present cash value versus a fifteen year payout at four percent interest is substantial.

Q. Did Mr. Lynn request that you sign the estate tax return?

A. No, I don't believe he did so.

Q. Did Mr. Heintz request you to sign it?

A. No. I believe the way we left it in early December was that I had obtained an extension and Mr. Heintz was filing the return.

EXAMINATION BY MR. ZIPPERSTEIN:

Q: Mr. Kuntz, Would you explain your answer with regard to the possible savings for the extate or increase in income for the estate of approximately $400,000.00 over a fifteen year period and how you arrive at that computation?

A: May I use the board?

Q: You certainly may.

A: (Using blackboard) This is my understanding. You would have, depending on how I.R.S. treats this 6166A for closely held stock interest which comprises about five different standards I.R.S. applies to see if you qualify. The two terms are (1) you pay no tax for five years; then you pay one-tenth of the tax due here in ten percent installments, and I believe that is four percent interest. That may be adjustable at the time by I.R.S. The other one is a simple ten year pay-out at one-tenth and these are elections for closely held business interests. The calculation is simple. Say you have $500,000.00 and say it earns sixteen percent interest. If this is tax free interest you get now a difference of $400,000.00 for $60,000.00 income over fifteen years, which would be $900,000.00 additional income to the estate. This would be subject to federal estate income tax. Eleven and a half percent tax free, you would have a seven and a half split on $500,000.00 over ten or fifteen years which would be $35,000.00 a year tax free to the estate if you qualifty under these two sections of the I.R.S. code. I don't know if we can qualify. We don't have those financial statements from the company. It takes those financial statements.

Q. Have you discussed this with Paul Heintz, co-executor?

A: Yes.

Q: Has he indicated to you catagorically the estate would not qualify?

A: Generally, yes.

Q: Your testimony is that that is a matter which could not be determined until say more or less there are new evaluations of the Peter Kuntz Company and affiliated companies to determine what their true value is for the federal estate tax purpose, is that correct?

A. Yes.

Q. You have testified that the figures in the inventory for the Peter Kuntz Company were as of figures in 1979. What particular date in 1979? What was the year end of the Peter Kuntz Company in 1979?

A. October 31, 1979.

William Kuntz, III Vol. 1 Pg 46

MR. ZIPPERSTEIN: (Continuing) Do you have any idea, Mr. Kuntz, as to why Winters National Bank, in their application for your removal filed September 11, 1980, should make an allegation that you neglected or refused to sell shares of various lumber companies at the appraised value when in fact the offer from Martin Kuntz for you to sell those stocks from the estate was not made until September 23, 1980?

William Kuntz, III - Direct Examination Vol. II Pg 28, 29

Q. With reference to Exhibit A, the account, your objection number 11 refers to Winters Bank not availing itself of the feasible tax treatment of IRS regulations in regard to the estate. In what form or reference to Exhibit A is your objection there, Mr. Kuntz?

A. It relates to payments to IRS.

Q. In what regards or aspects are you referring to, sir?

A. Considerable amount of the assets of the probate estate consist of stocks in closely held corporations of PK Company and various subsidiaries or affiliated companies. There is some market for some purpose but generally not a public maket for this stock. As such there is provision in the IRS code, being generally 6166, et seq. which allows for deferred federal estate tax payments in ratio to closely held stock or assets of the estate, allowing deferral of payment from ten to fifteen years in IRS charges at 4% interest on that. As reflected on this Exhibit A the tax liability runs into several hundreds of thousands of dollars. And at the time the tax treatment afforded by IRS that is allowing the deferral if payment of a large percent of the estate taxes and then being insolvent at 4% percent interest where you can obtain the entire amount of money at great savings to the estate over a fifteen year period. The figure could be from four to nine hundred thousand dollars. This was not done by the Bank.

William Kuntz, III — Direct Examination Vol. II Pg 30

A. I believe that it must be referred to generally in the amounts of cash receipts on page 7, printout page 8, of the documents sums of 50 and 40 and 62,000 that were received to the best of my knowledge from the sale of tax free bonds held in the estate, and these bonds were sold at a substantial discount and resulted in a loss of principal to the estate and trust and money reinvested has a less than competitive rate of interest. As

previously testified there were sufficient other cash assets available to the estate. No reason I can possibly see taking a loss on selling securities of 30 and 40 thousand dollars to merely reinvest the money with Winters Bank money express funds as that amount would be taxable under the federal estate (income) tax and tax free bonds would not be subject to any income tax and if held to maturity would recoup any discount that sold at market.

Q. Mr. Kuntz, as reflected in Exhibit A, if you can relate it to this proceeding, objection 15 refers to the bank acting improperly as trustee in that it received four million in settlement of the sale of North Central Mortgage Company to the detriment of the estate, the trust and the beneficiaries of said trust. In reference to where it was shown and referred to in Exhibit A, tell the Court what your objection is there, sir.

A. The deceased, William Kuntz, Sr., was the former president of Peter Kuntz Company and founder and chairman of North Central Financial Corporation which at the time of the demise was the fastest growing (mortgage) company in the state of Ohio and represented the fourth largest. Winters Bank as lead banker led a syndication of banks which make funds available to North Central for the purpose of buying and reselling VA and FHA loans which is considered Gennymae (Ginnie Mae) borrowing. With reference to Exhibit A, page 2 of the print out, page 3 of the documents, Peter Kuntz Company had 7,670 shares, refers to the amount of dividends flow and also refers to delivery of stock as previously testified to in the hearing before Judge Zimmers. This constituted the largest single block of stock in the Peter Kuntz Company. The posture of the bank as administrator, having care and control of this block of stock and the position of the bank in receiving for itself and its own account of seven million dollars as part of the pool of the payment of thirteen million dollars on the sale of North Central Corporation subject. . .

Q: What was the result of that valuation?

A. On the alternate valuation date the municipal bonds were considerably higher than the value submitted with the federal estate return, so , therefore, the alternate valuation date would have brought a higher valuation to the estate.

Q. Would there have been any change in the value of the preferred or subsidiary stocks or common stock?

A. These are not marketable, so I have to answer no, not to my knowledge. There is no market.

MR. ZIPPERSTEIN: What stocks were you referring to in the last question?

MR. GINGER: Preferred, common and subsidiary.

MR. ZIPPERSTEIN: All three?

A. Yes.

MR. GINGER: (Continuing) At the time of filing the federal estate tax return for the estate did you give any consideration to taking an installment payment election, under Internal Revenue Sections 6166 and 6166A?

A. I had heard the section mentioned. I did a limited amount of research myself, as far as these sections are concerned. I talked to Jim Lynn, our attorney.

Q. What opinion did he give you with regard to the election?

A. He felt there was no application.

Q. At the time of the February 5th hearing, during the recess at noon, did you again review that with me during the recess?

A-41

A. Yes.

Q. And what opinion did I give you?

A. You gave me the opinion that the section had no application.

Paul W. Heintz Vol. 1 Pg 94

Q. How many shares of the Peter Kuntz common stock do the executor's have? Approximately seven thousand shares?

A. Approximately eight percent.

COURT: Who has eight percent?

A. The executors own approximately eight percent of the parent company, the Peter Kuntz Company.

MR. ZIPPERSTEIN: (Continuing) You would agree with me would you not, Mr. Heintz, that if the earnings per share of the Peter Kuntz Company held by the executors are reduced from the value of $20.38 per share to $4.68 per share, that should be a matter of concern to the executors?

A. No.

Paul W. Heintz Vol. 1 Pg 126

Q. You were also aware that it wasn't necessary for the appraisers to use the same basis in reaching their appraisal if they got the alternate valuation as they did when they set their value in the original return?

A. They were court appointed, right?

Q. Therefore, they could have used, as you are well aware, a five year averaging rather than a ten year average and I.R.S. does accept that.

A. I.R.S. yes, and I think everybody should be aware of that. We use this figure for filing the return. The final determination is made by Internal Revenue, not by the court appointed panel.

Q. The fact is that you did not give I.R.S. an opportunity to arrive at an agreement as to an alternate valuation that you and William Kuntz (III) and the appraisers might come up with or you and William Kuntz (III), as co-executors, might come up with, isn't that correct? I.R.S. had no opportunity to agree or disagree with any alternate valuation, isn't that so?

A. That's so.

Q. And they had not that opportunity because you elected to file the return December 5, 1980?

A. At that time there was in effect IRS Section 6166 and 6166A. Those sections provided for a deferral of the payment of the estate tax attributable to the interest in closely held businesses which were being taxed in the estate. The computation is you take the value of the closely held business, you divide that by the gross estate and you multiply the result times the estate tax. That tax can be paid over a period of ten years. Inaddition the interest which is to be applied to that liability was computed at that time at the rate of four percent.

Q. Based upon your background and experience in tax, working with estates, what does this allow the estate to do, if such an alternative is taken?

A. Well, you can keep the estate open. You can take whatever in the estate is liquid, invest it, at that time a minimum of five or six percent, whatever the going interest rates were at that time, and meanwhile the cost of that money is four percent. Inaddition by keeping the estate open there is a planning opportunity of using the estate as a separate tax payer instead of having income deposited and based upon this beneficiary who may be in a high bracket can add that income to their highest bracket. You keep the estate open and it is treated as a separate tax payer, paying its own income tax, depending on the marginal brackets of the beneficiary, it can be a sizeable savings.

William Cohen - Cross-Examination Vol. II Pg 94

Q. Could you explain that to the court.

A. Section 6166 provides what was in effect a fifteen year deferral and there are no payments to be made in the first five years, and a tax payment in the ensuing ten years that tax is somewhat more difficult to qualify.

Q. Why?

A. Because the amount of the estate which is composed of closely held business interests has to be much higher, 65% of the estate.

Q. And what is the rule on the ten year deferred?

A. On the ten year deferral closely held business interests must be 35% of the gross estate, 50% of the taxable estate.

Q. Now, in your professional opinion the estate tax return in this particular case qualified for which treatment?

A. I would have to do a numerical test to determine whether or not 6166 was applicable. It was obvious 6166A did apply. 6166 as opposed to 6166A.

William Cohen - Cross-Examination Vol. II Pg 95

A. Yes. There is a two part test for corporations. If 20% or more of the value of the voting stock is included in determining the gross estate or if the corporation has ten or less shareholders, then that corporation is a closely held business. In addition if there are interests in two or more closely held businesses, then those can be aggregated and treated as one business if the decedent owned more than 50% of the value of each business.

Q. Mr. Cohen, you were asked on cross-examination about family attribution rules. Do you recall that?

A. Yes.

Q. Tell us, is there a difference between, based upon your experience and background, a difference between attribution rules and family attribution rules?

A. Well, there is an attribution rule in 6166A. I should say a so-called attribution rule where interest in corporations, where looking at one corporation 6166A would not apply. But if you aggregate the corporations and call them one business it does apply. The distinction is that there are at least five different attribution rules in the code for various code sections.

Q. This particular attribution rule in section 6166 is of what type of nature?

A. This is no family attribution. This is merely a method of combining business interests into one large business interest.

Q. You were asked on cross-examination about the ten year or fifteen year aspect. Which particular one goes with the ten year and which goes with the fifteen year?

A. The fifteen year deferral is code section 6166. The ten year deferral was code section 6166A.

A. In this particular case we don't believe you even have to aggregate the corporations.

Q. So Peter Kuntz Company standing alone would let you qualify. You would not have to aggregate any others, is that correct?

A. Yes

A. Following that the property was listed with Ed Hilton and Associates. The property was listed July 20, 1981, listing price $195,000.00.

Q. What activity was there while the listing was with Hilton?

A. The first written offer was received the end of August, August 30th, I believe. It was $170,000.00 calling for a purchase money mortgage over a five year period.

Q. Would you tell the court your understanding of a purchase money mortgage?

A. Essentially, it was a whole bag of seller financing techniques at that time. A purchase money mortgage allowed us to have the sale by conveying the deed and taking the mortgage back.

Q. What was the rate in taking the mortgage back?

A. 13%.

Q. What resulted from that offer?

A. The broker and the prospective buyer and myself met. We discussed the fact that the term was too long and that the price we felt was too low. The buyer agreed to increase his offer to $175,000.00 and shorten the loan period to three years. He also offered a $75,000.00 down payment which meant we were carrying $100,000.00 for the three year period at 13%.

Q. And was the property then sold on those terms?

A. We accepted the contract on September 1, 1981.

Q. And then did you subsequently close the transaction?

A. The closing was held on September 30, 1981.

Q. Mr. Naugle, you made reference to this purchase money mortgage that apparently was prevalent at that time. Do you in your experience as a real estate officer for Winters Bank, tell us why the prevalence of the money mortgage type of financing.

A. We have to put in prospective the general conditions in 1981. Our prime rate was approaching 20% again. The prevalent lending rate was 16% on first money mortgage. Real estate market was unsettled. This tier of financing which make payments possible including seller financing represent around thousands of second mortgage – purchase money mortgage. To me this was the best of the alternatives. We did not have an existing mortgage on this house which you assume and pay down the line. Our options were very limited. This was the best alternative we had.

Q. Was the return of 13% on a purchase money mortgage comparable to other rates in other transactions at that time?

A. I made a statement to Mr. Kuntz I thought the administration was taking far too long and the beneficiary of the estate, which was the bank as trustee for the benefit of himself and Mary Ann Dillon, would be damaged by the fact that it was being kept open.

Q. Did you ever make the statement to Mr. Kuntz, III, these words or words to the effect one of my main concerns is the ease of administration?

A. I don't believe so.

Q. Talking about the estate being open, you were referring to the fact of having the estate closed, terminated, so that there were no loose ends handing on for years at a time. Is that what you were referring to?

A. I am referring to the fact that the estate tax return had been filed at the twelfth hour and no taxes paid and the house was sitting vacant and costing the estate hundreds of dollars a month in maintenance costs. That's what I was speaking to.

Q. Now, Mr. Kuntz and you had had a conversation regarding use of Section 6166 of the IRS Code had you not?

A. Yes, sir.

Q. He had brought this to your attention had he not?

A. Yes.

Q. Did you make the statement to him these words or words to the effect that you did not feel that applied?

A. Yes, sir.

Q. Did you check that out? You had obtained Mr. Crew and his firm?

A. I checked with Mr. Crew and also our tax department.

A-50

Trace Swisher - Cross-Examination Vol. II Pg 183

Q. Now, other moneys were available for the purpose of federal estate tax was it not, besides the selling of these assets?

A. There was cash in the life insurance trust that could have been moved to the estate to pay some of those things, yes. Eventually it was.

Q. Insurance money was available as a result of the death of Mr. Kuntz, too, wasn't it?

A. Yes.

Q. That was approximately two hundred twenty thousand wasn't it?

A. Yes, sir.

Q. Were you involved in the application for that money?

A. Yes, sir.

Trace Swisher - Cross Examination Vol. II Pg 192

Q. Can you tell me from the insurance fund you refer to and the amount of it the estate had coming, did you ever contemplate prepayment of the estate tax to cut off interest running?

A. We did pay as funds became available. We felt it was important to keep some money in the trust mainly for the one beneficiary who was living off the income received from the proceeds.

Q. Who was that beneficiary?

A. Mary Ann K. Dillon.

Q. Insurance money was not used to prepay the tax?

A. No, it was not used to prepay tax.

Q. Was it used to make distribution to Mary Ann Dillon?

A. Some of the proceeds that went into her trust were loaned to Mary Ann Dillon for the purchase of a home in California.

Q. Wasn't there, from your understanding of the will, document suggested this estate – the purpose of the insurance money was for the funding of the estate and payment of such things as the taxes?

A. Part of it was. Part was used for that. Selling of the mortgage from the estate to the trust generated proceeds from the funds received from the insurance policy.

A. Correct.

Q. As I recall Mr. Cohen's testimony, he stated that in the event of a deficiency the election under Section 6166 would be available within sixty days after notice of the deficiency in the subject estate. In this estate we are concerned with of William Kuntz, was there a deficiency?

A. No, there was no deficiency assessment in this estate.

Q. If there is no deficiency assessment, when must the election be made?

A. The election must be filed at the time of filing or before the filing the federal estate tax return.

Q. Was there an election to defer tax made at the time that the federal estate tax return was filed in this case?

A. No, there was not.

Q. Now, with regard to the election to transfer taxes, it is my recollection of Mr. Cohen's testimony earlier today that this estate would have qualified to make such an election and that had such an election been made the estate would have paid four percent interest, it could have been kept open for ten years and funds reinvested in whatever the current rate was. That is my recollection of his testimony. Now, with regard to the applicability of this section we are referring to, assuming that the estate would qualify, would you explain to the Court how this section applies?

A. Well, there are sections 6166 and 6166A. 6166 is a fifteen year deferred payment that recognizes that the asset, closely held corporation, some single asset, constitutes 65% of the gross estate. There are also other requirements in connection with that. That is that you – the person must own – the decedent must own twenty percent of the stock of the corporation or there must be

fewer than fifteen shareholders. That is to qualify. And in this case and also this estate, he did not have twenty percent. But you can fill that void—he had about eight or nine percent of the stock of Peter Kuntz. You could fill that void by attribution. If you use attribution you are not eligible more than a five year delay for a five percent investment payment. Then you must go to 6166A which provides a ten year investment period. The first part is due when you file the return and interest at the going rate of I.R.S. which in this case in December was twelve percent—December 5, 1980, twelve percent. February 1, 1981 interest jumped to twenty percent which would have to remain in effect until the next change in the rate. This would have been economically unwise if we had qualified, if we had elected. That would not have been a wise move economically.

Q. Now, I would like for you to turn to objection to the partial account number 15, and this says that Winters National Bank acted improperly as trustee in that the bank received $4,000,000.00 in settlement of the sale of North Central Mortgage Company, to the detriment of the estate, the trust and the beneficiaries of said trust, as set forth in the affidavit of William Kuntz, III. Now, Mr. Swisher has already testified as trustee the bank had no involvement in this transaction. Do you have knowledge of the bank's involvement in this transaction as the bank as distinguished from the trust department?

A. I have some knowledge and the reason I have and the way I get this knowledge is that I am consulted from time to time on matters which refer to mortgage banking loans, and North Central represents a mortgage banker.

Q. Was there anything improper in the transaction with regard to the estate or any other matter?

A. The bank had nothing to do with the transaction but collecting money that was owed to them.

Q. And you were present when I asked certain questions of Mr. Swisher this afternoon were you not?

A. I was.

Q. And your firm and yourself are involved in representing the bank in other capacities are you not?

A. We do other work for the bank.

Q. In what area?

A. Security lending, principally in mortgage lending.

Q. There was testimony in regards to the Third National Bank acquiring of the North Central Mortgage Company?

A. That's correct.

Q. And after this was accomplished did this result in a loss of book value to the Peter Kuntz stock?

Q. Peter Kuntz? Pg. 218, 219

A. Peter Kuntz Company that were owned by Bill Kuntz.

Q. Showing you what has been – what is your affidavit with is part of the objections to partial account signed by you the 21st day of February 1983, does that affidavit represent your statement as to what took place regarding appraisal of stock?

Y. Yes.

Q. Did you participate in any appraisal of the preferred stock?

A. No.

Q. On the inventory filed there is a signature of – in the same area of David Reese, Thomas Gilfoil and yourself. Did you know if the other appraisers participated in any of the appraisals of the preferred stock?

A. I don't know that they did.

Q. You have no knowledge of it?

A. No.

Q. On the inventory and appraisement filed August 22, 1980, the schedule of assets there is an X under appraisal for preferred and some common stock on the subsidiary. Did you participate in that appraisal?

A. Only the 7,670 shares of common stock.

Q. Do you have knowledge if the appraiser whose signature appears on the front of that document – as to where the figures for the preferred and common stock of the other companies came from?

A. I don't believe so.

Q. Who made the presentation to you appraisers regarding the common?

A. Initially it was Paul Heintz who was an officer of the company — Treasurer, I believe.

Q. Where was that done at?

A. In the home office downtown here.

Q. The Company's office?

A. Yes.

MR. KIRKLAND: Nothing further.

A-57

In the

Common Pleas Court of Montgomery County, Ohio

Vicki D. Pegs
Recorder

ASSIGNMENT OF MORTGAGE

Mortgager:	William F. Wesig and Margie E. Wesig
Amount Secured:	$100,000.00
Dated:	September 30, 1981
Filed:	September 30, 1981
Recorded:	Microfiche 81-871-D11

KNOW ALL MEN BY THESE PRESENTS:

That the undersigned, for a valuable consideration, does hereby assign, transfer and set over all right, title and interest in and to the above-referenced mortgage to Winters National Bank and Trust Company, Trustee, whose mailing address is Winters Bank Tower, Dayton, Ohio 45401.

Dated this 13th day of August, 1982.

Executed in the presence of:

WINTERS NATIONAL BANK AND TRUST COMPANY
Administrator De Bonis Non
With Will Annexed
of the Estate
of WILLIAM KUNTZ,
Deceased

_____

_____ By _____
Vice President

A-58

STATE OF OHIO)
ss.
COUNTY OF MONTGOMERY,)

Before me, a Notary Public in and for said County and State, personally appeared the above-named L. D. Kneisly, Vice President of Winters National Bank and Trust Company, Administrator De Bonis Non with Will Annexed of the Estate of William Kuntz, Deceased, and acknowledged the signing of said instrument to be the voluntary act and deed of said corporation as such administrator for the uses and purposes therein mentioned.

IN TESTIMONY WHEREOF, I have hereunto subscribed my name and affixed my notarial seal this 13th day of August, 1982.

ROBERT B. CREW
ATTORNEY AT LAW

_____
Notary Public

A-59

Form 843

(Rev. December 1983)

Claim

Department of the Treasury ► See Instructions on back.

Instructions

If you are filing the claim as a legal representative for a decedent whose return you filed, attach to the claim a statement that you filed the return and are still acting as the representative. If you did not file the decedent's return, attach to the claim certified copies of letters testamentary, letters of administration, or similar evidence to show your authority.

No. 90-1726

Supreme Court, U.S.
FILED
JUN 6 1991
OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

WILLIAM KUNTZ, III (in his personal capacity as co-executor of the estate of William Kuntz, Sr.), as a common shareholder of the Peter Kuntz Company, on its behalf, as a member of a class of shareholders and in his own right,

Petitioner,

v.

SHAWMUT BANK OF BOSTON, THE FIRST NATIONAL BANK OF CINCINNATI, THE CENTRAL TRUST BANK, THE SOCIETY BANK, THE MERCHANTS NATIONAL BANK & TRUST CO., BANK ONE DAYTON N.A., MERRILL LYNCH, PIERCE, FENNER & SMITH, INC., *et al.*, and JANE or JOHN DOES 1-299,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE THIRD DEPARTMENT OF THE APPELLATE DIVISION OF THE SUPREME COURT OF THE STATE OF NEW YORK AND/OR JUDGE DOMINICK VISCARDI, NEW YORK SUPREME COURT, ESSEX COUNTY

BRIEF FOR RESPONDENT BANK ONE, DAYTON, N.A. IN OPPOSITION

CAMERON CLARK
Counsel of Record

PAUL, WEISS, RIFKIND, WHARTON & GARRISON
1285 Avenue of the Americas
New York, New York 10019-6064
(212) 373-3000

Attorneys for Respondent
BANK ONE, DAYTON, N.A.

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES iii

STATEMENT OF THE CASE 3

A. The Federal Court Action 4

B. The State Court Action 5

ARGUMENT 8

I. THIS COURT LACKS JURISDICTION BECAUSE THE PETITION RAISES NO SUBSTANTIAL FEDERAL QUESTION AND ADEQUATE AND INDEPENDENT STATE GROUNDS SUPPORT THE LOWER COURTS' DECISIONS 8

A. The Petition Raises No Substantial Federal Question 8

B. Adequate and Independent State Grounds Support the Decisions Below 10

Page

II. THE STATE COURT PROPERLY DISMISSED PETITIONER'S COMPLAINT BASED ON LACK OF STANDING, *RES JUDICATA* AND FAILURE TO PLEAD WITH PARTICULARITY 10

A. Petitioner Lacks Standing When His Only Injury is a Decline in Value of His Stock 10

B. Petitioner is Barred by *Res Judicata* from Relitigating the Issue of Standing 13

C. The Complaint Fails to Plead the Material Elements of Any Cause of Action 15

CONCLUSION 16

TABLE OF AUTHORITIES

Page

Cases:

Abrams v. *Donati*,
66 N.Y.2d 951, 489 N.E.2d 751,
498 N.Y.S.2d 782 (1985) (mem.) 11

Adams-Lundy v. *Association of Professional Flight Attendants*, 844 F.2d 245
(5th Cir. 1988) (per curiam) 9

Matter of Auditore,
249 N.Y. 335, 164 N.E. 242 (1928) 13

Burns v. *Egan*,
117 A.D.2d 38, 501 N.Y.S.2d 742
(3d Dep't), *appeal dismissed*,
68 N.Y.2d 806, 498 N.E.2d 435,
506 N.Y.S.2d 1034 (1986) 14, 15

Cutler v. *Fitch*,
231 A.D. 8, 246 N.Y.S. 28 (4th Dep't 1930) 13

Eisenberg v. *Flying Tiger Line, Inc.*,
451 F.2d 267 (2d Cir. 1971) 12

Equitable Life Assurance Society v. *Brown*,
187 U.S. 308 (1902) 8

Page

Fifty States Management Corp. v. *Niagara Permanent Savings and Loan Association*, 58 A.D.2d 177, 396 N.Y.S.2d 925 (4th Dep't 1977) 10, 11, 14

General Motors Acceptance Corp. v. *Kalkstein*, 101 A.D.2d 102, 474 N.Y.S.2d 493 (1st Dep't 1984) 11

General Rubber Co. v. *Benedict*, 215 N.Y. 18, 109 N.E. 96 (1915) 13

Hammer v. *Werner*, 239 A.D. 38, 265 N.Y.S. 172 (2d Dep't 1933) 12

Herb v. *Pitcairn*, 324 U.S. 117 (1945) 10

Howell Hydrocarbons, Inc. v. *Adams*, 897 F.2d 183 (5th Cir. 1990) 9

Independent Investor Protective League v. *Time, Inc.*, 50 N.Y.2d 259, 406 N.E.2d 486, 428 N.Y.S.2d 671 (1980) 11

Israel v. *Wood Dolson Co.*, 1 N.Y.2d 116, 134 N.E.2d 97, 151 N.Y.S.2d 1 (1956) 14

Mortell v. *Mortell Co.*, 887 F.2d 1322 (7th Cir. 1989) 9

Page

Murdock v. *Memphis*,
87 U.S. (20 Wall.) 590 (1875) 10

New York ex rel. Bryant v. *Zimmerman*,
278 U.S. 63 (1928) 8

Niles v. *New York Central & Hudson River R.R. Co.*,
176 N.Y. 119, 68 N.E. 142 (1903) 12

Pelletier v. *Zweifel*,
921 F.2d 1465 (11th Cir. 1991) 9

Peri v. *State of New York*,
66 A.D.2d 949, 411 N.Y.S.2d 709
(3d Dep't 1978), *aff'd on opinion below*,
48 N.Y.2d 734, 397 N.E.2d 1332,
422 N.Y.S.2d 665 (1979) 15

Prince v. *Gurvitz*,
37 A.D.2d 727, 323 N.Y.S.2d 861
(2d Dep't 1971) 12

Rand v. *Anaconda-Ericsson, Inc.*,
794 F.2d 843 (2d Cir.), *cert. denied*,
479 U.S. 987 (1986) 9, 14

Ritchie v. *McMullen*,
79 F. 522 (6th Cir.), *cert. denied*,
168 U.S. 710 (1897) 12, 13

Roeder v. *Alpha Industries, Inc.*,
814 F.2d 22 (1st Cir. 1987) 9

Rylewicz v. *Beaton Services, Ltd.*,
888 F.2d 1175 (7th Cir. 1989) 9

Saud v. *Bank of New York*,
929 F.2d 916 (2d Cir. 1991) 9

Simpson Electric Corp. v. *Leucadia, Inc.*,
72 N.Y.2d 450, 530 N.E.2d 860,
534 N.Y.S.2d 152 (1988) 5

Sparling v. *Hoffman Const. Co.*,
864 F.2d 635 (9th Cir. 1988) 9

In re Sunrise Securities Litigation,
916 F.2d 874 (3d Cir. 1990) 9

Tafflin v. *Levitt*, 110 S. Ct. 792 (1990) 5

Vincel v. *White Motor Corp.*,
521 F.2d 1113 (2d Cir. 1975) 12

Von Au v. *Magenheimer*, 126 A.D. 257,
110 N.Y.S. 629 (2d Dep't 1908), *aff'd*,
196 N.Y. 510, 89 N.E. 1114 (1909) 12

Warner v. *Alexander Grant & Co.*,
828 F.2d 1528 (11th Cir. 1987) 9

Page

Webb v. *Webb*, 451 U.S. 493 (1981) 8

Xerox Corp. v. *Genmoora Corp.*,
888 F.2d 345 (5th Cir. 1989) 11

Zucht v. *King*, 260 U.S. 174 (1922) 8

Statutes:

18 U.S.C. § 1961 *et seq.* 4

28 U.S.C. § 1257 8

CPLR § 3013 . . . . . 6, 15

CPLR § 3016 7

No. 90-1726

IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

WILLIAM KUNTZ, III (in his personal capacity as co-executor of the estate of William Kuntz, Sr.), as a common shareholder of the Peter Kuntz Company, on its behalf, as a member of a class of shareholders and in his own right,

Petitioner,

v.

SHAWMUT BANK OF BOSTON, THE FIRST NATIONAL BANK OF CINCINNATI, THE CENTRAL TRUST BANK, THE SOCIETY BANK, THE MERCHANTS NATIONAL BANK & TRUST CO., BANK ONE DAYTON N.A., MERRILL LYNCH, PIERCE, FENNER & SMITH, INC., *et al.*, and JANE or JOHN DOES 1-299,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE THIRD DEPARTMENT OF THE APPELLATE DIVISION OF THE SUPREME COURT OF THE STATE OF NEW YORK AND/OR JUDGE DOMINICK VISCARDI, NEW YORK SUPREME COURT, ESSEX COUNTY

BRIEF FOR RESPONDENT BANK ONE, DAYTON, N.A. IN OPPOSITION

Respondent Bank One, Dayton, N.A. ("Bank One")[1/] submits this brief in opposition to the petition for a writ of certiorari filed by petitioner William Kuntz, III.

Bank One and the other respondents have been subjected to litigation by petitioner on the claims asserted here since 1986 when he sued *pro se* in the district court in Manhattan. His claims were dismissed at the trial and appellate levels of the federal system and his petition for certiorari here was rejected as untimely. Petitioner then asserted the same claims in New York state court, which dismissed them on three independent, state law grounds: lack of standing, *res judicata* and failure to plead in compliance with state procedural law. That dismissal was affirmed on appeal and petitioner's motions for leave to appeal to the New York Court of Appeals were denied both by the intermediate appellate court and by the Court of Appeals itself. As he now presents himself before this Court, therefore, petitioner's claims have already been subjected to judicial scrutiny by two trial court judges (one federal, one state), eight appellate judges (three federal, five state), and, on the issue of whether his appeal merited further review, 12 state appellate judges (five in the intermediate court and seven in New York's highest court).

The instant petition should be denied because it raises no substantial federal question, and adequate and independent state grounds support the lower courts' decisions. The lower

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1/ Pursuant to Supreme Court Rule 29.1, respondent Bank One discloses that its parent company is Banc One Corporation and that it has no subsidiaries.

courts, moreover, properly dismissed petitioner's complaint on each of the three state law grounds.

STATEMENT OF THE CASE

Petitioner claims to be a stockholder of the Peter Kuntz Company (the "Company"). He alleges that the Company, an Ohio corporation, was the beneficial owner of interests in two Ohio banks -- North Central Mortgage Company ("North Central") and Scioto Savings and Loan Association ("Scioto"). Petitioner asserts that Bank One and the other respondents conspired to render North Central uncompetitive, thereby enabling one of the respondents to purchase the Company's interests in North Central and Scioto. This is alleged to have destroyed the value of the Company's stock with the result that the Company went into liquidation in July 1986 (JA75-77).[2/]

Petitioner purports to sue both as a shareholder of the Company and as co-executor of the estate of his grandfather, William Kuntz, Sr. (the "Estate") (JA75).[3/] It is alleged that one of the assets of the Estate was stock in the Company.

2/ Citations preceded by "P___" refer to pages of the Petition for a Writ of Certiorari; "A___" to the appendix to the Petition for a Writ of Certiorari; and "JA___" to the joint appendix submitted to the Appellate Division, Third Department.

3/ According to the petition's caption, petitioner sues "on [the Company's] behalf". The complaint, however, asserts no derivative claim (JA75). Similarly, although the petition states that Winters National Bank, a predecessor of Bank One, was a trustee of the Estate (P4-5), the complaint does not so allege (JA77).

Petitioner in his various capacities seeks damages of $1.62 billion, plus interest, "multiplied according to law" (JA79).

A. The Federal Court Action

In September 1986, petitioner, appearing *pro se*, brought an action in the United States District Court for the Southern District of New York against the same group of defendants (the "Federal Court Action"). The complaint alleged that the defendants, acting in concert, drove North Central into financial difficulty in order to force the Company to sell its interests in North Central and Scioto. Claims were asserted under the Racketeer Influenced and Corrupt Organizations Act, 18 U.S.C. § 1961 *et seq.* (1982) ("RICO"), and "a number of the securities laws," as well as pendent state law claims including breach of fiduciary duty (JA80-114).

The Federal Court Action was dismissed with prejudice on May 12, 1987 for, *inter alia*, lack of standing. Noting that petitioner's only injury was the loss of value of his Company stock, the district court held that any possible cause of action belonged to the corporation, and not the shareholder (A36e-37e). The court noted that the claims could be brought derivatively, but added that the requirements for such a suit had not been met (A37e-38e). The United States Court of Appeals for the Second Circuit affirmed unanimously in an unpublished order dated January 6, 1988 (A29e-30e). 841 F.2d 1116. A petition for a writ of certiorari was rejected as untimely by this Court on May 4, 1988 (JA149), and petitioner's application for a writ of mandamus directing the clerk to accept the untimely certiorari petition was denied on November 14, 1988. 488 U.S. 952.

B. The State Court Action

1. The Complaint

The present action was commenced in New York Supreme Court, Essex County by service of a summons with notice on August 9, 1988, followed by a complaint on August 22. The complaint is an abbreviated version of the dismissed complaint in the Federal Court Action. Again, petitioner pleads claims as a common shareholder of the Company and as co-executor of the Estate. As in the Federal Court Action, the complaint asserts that respondents, acting in concert, sought to injure North Central in order to force the sale of the Company's holdings in North Central and Scioto. The complaint alleges RICO violations and lists seventeen "unlawful acts" sounding in tort and breach of contract (JA74-79).

2. The Motions to Dismiss

On November 16, 1988, Bank One moved to dismiss the complaint. The grounds asserted were (1) lack of personal jurisdiction over Bank One, (2) lack of subject matter jurisdiction over the RICO claim,[4/] (3) *res judicata* based on the prior decision in the Federal Court Action, (4) lack of standing, (5) failure to plead fraud, undue influence or breach

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4/ This ground was abandoned following the decision of the New York Court of Appeals in *Simpson Electric Corp.* v. *Leucadia, Inc.*, 72 N.Y.2d 450, 530 N.E.2d 860, 534 N.Y.S.2d 152 (1988), which held that state courts have concurrent jurisdiction over RICO claims. (This Court reached the same conclusion in *Tafflin* v. *Levitt*, 110 S. Ct. 792 (1990).)

of trust with the requisite particularity, and (6) failure to state any claim on which relief may be granted (JA152-58). The other respondents also filed motions to dismiss urging many or all of the same grounds (JA33-151, 161-65).

Petitioner opposed the motions, arguing that he had standing and that the complaint was sufficient. He argued also that he should be permitted to amend the complaint after discovery (JA260-67).

3. The Decisions Below

On May 19, 1989, the Essex County Supreme Court (Viscardi, J.) granted Bank One's and the other respondents' motions to dismiss the complaint. The court reasoned that the only alleged injury was a decrease in value of the Company's stock, and held that petitioner lacked standing to assert this claim. The court held also that its decision, in any event, was governed by *res judicata* based on the final decision in the Federal Court Action. Finally, the court ruled that the complaint failed to plead its claims with sufficient particularity in violation of CPLR § 3013.[5/] The court did not reach two additional grounds for dismissal raised in Bank One's motion: (a) lack of personal jurisdiction, and (b) failure to plead fraud, undue influence or breach of trust

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[5/] CPLR § 3013 provides that "[s]tatements in a pleading shall be sufficiently particular to give the court and parties notice of the transactions, occurrences, or series of transactions or occurrences, intended to be proved and the material elements of each cause of action or defense."

with particularity in violation of CPLR § 3016. Leave to replead was not granted (JA26-32).[6/]

Following an unsuccessful motion for rehearing, petitioner appealed the Essex County Supreme Court's orders on each of the three grounds for dismissal, and requested, apparently in the alternative, that the orders be modified to dismiss the complaint without prejudice (A1d-28d). On July 12, 1990, the orders were unanimously affirmed by the Appellate Division, Third Department, on the opinion below (A1b-2b). 163 A.D.2d 697, 559 N.Y.S.2d 825. Leave to appeal to the New York Court of Appeals was denied, first by the Appellate Division on October 31, 1990, and then by the Court of Appeals on February 12, 1991 (A1a). 77 N.Y.2d 803, 569 N.E.2d 874, 568 N.Y.S.2d 15. There were no dissenters in either court.

6/ The decision of the Essex County Supreme Court, which is not included in the appendix to the Petition for a Writ of Certiorari, is attached as an appendix to this brief.

ARGUMENT

I.

THIS COURT LACKS JURISDICTION BECAUSE THE PETITION RAISES NO SUBSTANTIAL FEDERAL QUESTION AND ADEQUATE AND INDEPENDENT STATE GROUNDS SUPPORT THE LOWER COURTS' DECISIONS

A. The Petition Raises No Substantial Federal Question

Petitioner premises this Court's jurisdiction (P2), as he must, on 28 U.S.C. § 1257, which provides for certiorari review of final state court judgments where (1) the validity of a federal statute or treaty is drawn in question, (2) the validity of a state statute is drawn in question as repugnant to federal law, or (3) "any title, right, privilege, or immunity is specially set up or claimed" under federal law -- in short, where a federal question is raised. Because petitioner raises no substantial federal question in the petition at bar -- as indeed he did not at any stage of the state court proceedings below -- this Court lacks jurisdiction to grant the petition.

It is elementary that a substantial federal question must exist in order to invoke this Court's jurisdiction over a final state court judgment. 28 U.S.C. § 1257 (1988); *Zucht* v. *King*, 260 U.S. 174, 176 (1922); *Equitable Life Assurance Society* v. *Brown*, 187 U.S. 308, 311 (1902). Moreover, this Court does not consider federal questions that were not raised in the state court. *Webb* v. *Webb*, 451 U.S. 493, 496-97 (1981); *New York ex rel. Bryant* v. *Zimmerman*, 278 U.S. 63, 67 (1928).

Apart from its assertion of this Court's appellate jurisdiction, the petition at bar does not cite a single federal statute or constitutional provision; nor were any cited in the state court proceedings below. Petitioner asks this Court to review purely state law questions: (1) whether, under New York law, a shareholder has standing to sue where the only injury alleged is a diminution in the value of his stock, and (2) whether, under New York law, a prior judicial decision dismissing a claim for lack of standing has *res judicata* effect.[2/] Accordingly, this Court lacks jurisdiction over the instant petition.

[2/] Indeed, petitioner's complaint alleges only a single non-state law claim: RICO. Even if the petition could somehow be read to challenge the correctness of the lower courts' decisions with respect to the RICO claim, such a question would be insubstantial. RICO does not alter the traditional rule that a shareholder lacks standing to recover directly for the diminution in value of his or her stock. *Roeder* v. *Alpha Industries, Inc.*, 814 F.2d 22, 29-30 (1st Cir. 1987); *Rand* v. *Anaconda-Ericsson, Inc.*, 794 F.2d 843, 849 (2d Cir.), *cert. denied*, 479 U.S. 987 (1986); *In re Sunrise Securities Litigation*, 916 F.2d 874, 886-88 (3d Cir. 1990); *Adams-Lundy* v. *Association of Professional Flight Attendants*, 844 F.2d 245, 250 (5th Cir. 1988) (per curiam); *Rylewicz* v. *Beaton Services, Ltd.*, 888 F.2d 1175, 1179 (7th Cir. 1989); *Sparling* v. *Hoffman Const. Co.*, 864 F.2d 635, 640-41 (9th Cir. 1988); *Warner* v. *Alexander Grant & Co.*, 828 F.2d 1528, 1530 (11th Cir. 1987). Similarly, RICO is not exempt from the usual principles of *res judicata*. *Saud* v. *Bank of New York*, 929 F.2d 916, 918-19 (2d Cir. 1991); *Howell Hydrocarbons, Inc.* v. *Adams*, 897 F.2d 183, 188 (5th Cir. 1990); *Mortell* v. *Mortell Co.*, 887 F.2d 1322, 1324-26 (7th Cir. 1989); *Pelletier* v. *Zweifel*, 921 F.2d 1465, 1500-02 (11th Cir. 1991).

B. Adequate and Independent State Grounds Support the Decisions Below

Even if a state court judgment raises a substantial federal question, this Court will not review it if the judgment rests also on an adequate and independent state ground. *Herb* v. *Pitcairn*, 324 U.S. 117, 125 (1945); *Murdock* v. *Memphis*, 87 U.S. (20 Wall.) 590, 636 (1875). Here, the decisions below rested on three independent, state law grounds: lack of standing, *res judicata* and failure to plead with particularity. Petitioner challenges only the first two of these grounds. Accordingly, even if he raised a substantial federal question as to those, there would remain an adequate and independent state ground barring review by this Court.

II.

THE STATE COURT PROPERLY DISMISSED PETITIONER'S COMPLAINT BASED ON LACK OF STANDING, *RES JUDICATA* AND FAILURE TO PLEAD WITH PARTICULARITY

A. Petitioner Lacks Standing When His Only Injury is a Decline in Value of His Stock

The New York courts correctly held that petitioner lacks standing to assert the claims at bar because the only alleged injury is diminution in the value of Company stock. Citing *Fifty States Management Corp.* v. *Niagara Permanent Savings and Loan Association*, 58 A.D.2d 177, 179, 396 N.Y.S.2d 925, 927 (4th Dep't 1977), the trial court held that

> [t]he law is well settled that a shareholder has no right to bring an action in his own name and in his own behalf for a wrong committed against the corporation even though the particular wrong may have resulted in a depreciation or destruction of the value of the corporate stock . . . .

(JA30). *See also Abrams* v. *Donati*, 66 N.Y.2d 951, 953, 489 N.E.2d 751, 751, 498 N.Y.S.2d 782, 783 (1985) (mem.) ("For a wrong against a corporation a shareholder has no individual cause of action, though he loses the value of his investment . . . ."); *General Motors Acceptance Corp.* v. *Kalkstein*, 101 A.D.2d 102, 106, 474 N.Y.S.2d 493, 495 (1st Dep't 1984).

The petition at bar (like the briefs below) ignores completely the reasoning of the state court and the holding of *Fifty States Management Corp.* Instead, in what constitutes his entire discussion of the standing issue, petitioner "repeats previous submissions made in the courts below in that he relies on the judgment[s]" in two specified decisions (P13).

The first decision, *Independent Investor Protective League* v. *Time, Inc.*, 50 N.Y.2d 259, 406 N.E.2d 486, 428 N.Y.S.2d 671 (1980), permits initiation of a shareholder derivative action after the subject corporation has been dissolved and has distributed its assets. The second decision, *Xerox Corp.* v. *Genmoora Corp.*, 888 F.2d 345, 350-52 (5th Cir. 1989), involves the sufficiency of allegations of injury in a shareholder derivative action. Neither decision is in any way germane: in the case at bar, petitioner has not sued derivatively.

The other cases that petitioner cited below involve instances where shareholder claims were permitted in circumstances bearing no relation to the facts at bar. First, petitioner relied on cases involving dilution of shareholder voting rights -- *Eisenberg* v. *Flying Tiger Line, Inc.*, 451 F.2d 267 (2d Cir. 1971), and *Hammer* v. *Werner*, 239 A.D. 38, 265 N.Y.S. 172 (2d Dep't 1933). A claim of dilution belongs to the affected shareholder and not to the corporation, and therefore an individual action by the shareholder is allowed. In the present case, however, there is no such claim. The core allegation here is that respondents wrongfully caused the Company, of which petitioner was a shareholder, to sell its "crown jewels" at an unfair price. This had no impact on petitioner's voting rights in the Company.

Second, petitioner cited various cases in which defendant's actions were aimed at coercing the plaintiff to part with his or her stock -- *Von Au* v. *Magenheimer*, 126 A.D. 257, 110 N.Y.S. 629 (2d Dep't 1908), *aff'd*, 196 N.Y. 510, 89 N.E. 1114 (1909); *Ritchie* v. *McMullen*, 79 F. 522 (6th Cir.), *cert. denied*, 168 U.S. 710 (1897); *Vincel* v. *White Motor Corp.*, 521 F.2d 1113 (2d Cir. 1975); *Prince* v. *Gurvitz*, 37 A.D.2d 727, 323 N.Y.S.2d 861 (2d Dep't 1971); *Niles* v. *New York Central & Hudson River R.R. Co.*, 176 N.Y. 119, 68 N.E. 142 (1903). Again, however, that is not what is claimed in the present case. Petitioner does not allege that he was coerced to part with his stock in the Company, but rather that the Company was wrongfully deprived of assets. That is an injury to the corporate entity, not to the individual shareholder.

Finally, petitioner relied on cases permitting a shareholder to sue where the defendant owed him or her a special duty -- *Matter of Auditore*, 249 N.Y. 335, 164 N.E. 242 (1928); *Cutler* v. *Fitch*, 231 A.D. 8, 246 N.Y.S. 28 (4th Dep't 1930); *General Rubber Co.* v. *Benedict*, 215 N.Y. 18, 109 N.E. 96 (1915); *Ritchie* v. *McMullen*, 79 F. 522 (6th Cir.), *cert. denied*, 168 U.S. 710 (1897). Petitioner argued below that Bank One owed him such a duty -- presumably under Ohio estates law (Alf-10f) -- because it acted as co-executor of the estate of the Company's chairman. The complaint does not allege, however, that Bank One was co-executor (JA74-79), nor was this asserted in petitioner's opposition to the motions to dismiss (JA260-95). Moreover, the case at bar, unlike those cited by petitioner, contains no particularized claim of malicious motive by Bank One which, even assuming it was named in the complaint as co-executor, had no interest in the challenged conduct.

In short, the cases cited by petitioner both in this Court and in the New York courts do not call into question the lower courts' conclusion that the injury alleged here is corporate in nature and cannot be sued upon except derivatively.

B. Petitioner is Barred by *Res Judicata* from Relitigating the Issue of Standing

The lower courts ruled that the final decision in the Federal Court Action, which held that petitioner lacked standing because the only claimed injury was a decline in value of the Company's stock, had *res judicata* effect precluding relitigation of the issue (JA31). Because the case

at bar asserts the same claims against the same parties, the courts below were clearly correct.

Petitioner argues, as he did below, that a dismissal on standing grounds is not a decision "on the merits" and therefore lacks preclusive effect (P13).[8/] This is flatly wrong as a matter of New York law. In *Burns* v. *Egan*, 117 A.D.2d 38, 41-42, 501 N.Y.S.2d 742, 745-46 (3d Dep't), *appeal dismissed*, 68 N.Y.2d 806, 498 N.E.2d 435, 506 N.Y.S.2d 1034 (1986), *res judicata* was held to bar plaintiffs from relitigating the issue of standing in a second suit arising from the same set of circumstances. The court concluded that *res judicata* precluded relitigation despite the fact that a dismissal for lack of standing is not technically an adjudication on the merits. The New York Court of Appeals could, of course, have reviewed this holding by granting petitioner leave to appeal. It declined to do so.

The essential elements for the application of *res judicata* are all present in this case: the decision in the Federal Court Action is (a) a final decision, (b) by a court of competent jurisdiction, involving (c) the same parties, and (d) the same cause of action. *Israel* v. *Wood Dolson Co.*, 1 N.Y.2d 116, 118, 134 N.E.2d 97, 98, 151 N.Y.S.2d 1, 3 (1956).

[8/] Petitioner argued below that the federal ruling on standing is not controlling because state standing rules differ. State and federal decisions both hold, however, that a shareholder lacks standing when the only injury alleged is a decline in the value of stock. *Compare Fifty States Mgmt. Corp.* v. *Niagara Permanent Sav. & Loan Ass'n*, 58 A.D.2d 177, 179, 396 N.Y.S.2d 925, 927 (4th Dep't 1977) *with Rand* v. *Anaconda-Ericsson, Inc.*, 794 F.2d 843, 849 (2d Cir.), *cert. denied*, 479 U.S. 987 (1986).

Accordingly, under *Burns* v. *Egan*, the decisions below correctly held that petitioner is barred from relitigating the issue of standing.

C. The Complaint Fails to Plead the Material Elements of Any Cause of Action

Finally, the state court dismissed the complaint for failure to meet the threshold pleading standards set forth in CPLR § 3013, as construed in *Peri* v. *State of New York*, 66 A.D.2d 949, 411 N.Y.S.2d 709 (3d Dep't 1978), *aff'd on opinion below*, 48 N.Y.2d 734, 397 N.E.2d 1332, 422 N.Y.S.2d 665 (1979). The decisions below held that the complaint provided neither sufficient notice of the transactions or occurrences intended to be proved, nor the material elements of each cause of action (JA31-32). Petitioner does not challenge this ruling, which alone suffices to defeat the petition.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Dated: New York, New York
June 5, 1991

Respectfully submitted,

Cameron Clark
Counsel of Record
Alan Effron

Paul, Weiss, Rifkind, Wharton & Garrison
1285 Avenue of the Americas
New York, New York 10019-6064
(212) 373-3000

Attorneys for Respondent Bank One, Dayton, N.A.

APPENDIX

STATE OF NEW YORK

SUPREME COURT COUNTY OF ESSEX

WILLIAM KUNTZ, III, (in his personal capacity), WILLIAM KUNTZ, III, (Co-Executor of the Estate of William Kuntz Senior), WILLIAM KUNTZ, III, (As a Common Shareholder in the Peter Kuntz Company), WILLIAM KUNTZ, III, (As the Member of the Class of Shareholders),

Plaintiff,

-against-

THE SHAWMUT BANK OF BOSTON, and THE FIRST NATIONAL BANK OF CINCINNATI, and THE CENTRAL TRUST BANK, and, THE SOCIETY BANK, and MERCHANTS NATIONAL BANK & TRUST, and BANK ONE DAYTON, N.A., and MERRILL LYNCH, PIERCE, FENNER & SMITH, INC., et al. and JANE OR JOHN DOES, 1-299,

Defendants.

APPEARANCES: BENJAMIN CONLON, ESQ.
Attorney for Plaintiff
11 N. Pearl Street, Suite 707
Albany, New York 12207

BOYLE, VOGELER & HAIMES
Attorneys for Defendants, Star Bank,
National Association, Cincinnati,
The Central Trust Company, N.A.
and Merchants National Bank
& Trust Company of Indiana
1270 Avenue of the Americas
New York, New York 10020

KAREN M. BUCKLEY, ESQ.
McCLUNG, PETERS AND SIMON
Attorneys for Merrill Lynch, Pierce,
Fenner & Smith, Inc.
41 State Street
Albany, New York 12207

STEWART A. POMERANTZ, ESQ.
SCHULTE, ROTH & ZABEL
Attorneys for Shawmut Bank
of Boston
900 Third Avenue
New York, New York 10022

MARY CRAWLEY, ESQ.
PAUL, WEISS, RIFKIND,
WHARTON & GARRISON
Attorneys for Bank One
Dayton, N.A.
1285 Avenue of the Americas
New York, New York 10019

PETER D. FITZGERALD, ESQ.
LAPANN, REARDON, MORRIS,
FITZGERALD & FIRTH
Attorneys for The Society Bank
One Broad Street Plaza
P.O. Box 2069
Glens Falls, New York 12801

VISCARDI, J., The defendants in this action each seek an order to dismiss the complaint against them on various grounds.

The defendant, The Shawmut Bank of Boston ("Shawmut") seeks an order dismissing the complaint as against it pursuant to CPLR Section 3211, 3013 and 3016(b). The defendants, Star Bank, National Association, Cincinnati, The Central Trust Company, N.A., and Merchants National Bank & Trust Company of Indiana (collectively, "lending banks") seek an order dismissing the complaint on the grounds that the court lacks personal jurisdiction over the lending banks, the plaintiff lacks standing to maintain this action, the complaint fails to state a cause of action upon which relief can be granted and the plaintiff has failed to plead his claim with sufficient particularity. The defendant Society Bank, N.A. ("Society Bank") seek an order pursuant to CPLR Section 3211 dismissing the complaint on the grounds that the plaintiff lacks personal jurisdiction over the Society Bank because the plaintiff failed to acquire long arm jurisdiction and make proper service of process upon the Society Bank, that the Federal Courts have exclusive jurisdiction over "RICO" claims and thus the court lacks subject matter jurisdiction, that the plaintiff lacks the capacity to sue and that a shareholder of a company has no standing in bringing an action on his own behalf for diminution in the

value of his shares, and that the complaint fails to state a cause of action because the plaintiff has failed to plead the material elements of the causes of action and has failed to plead with particularity the circumstances constituting fraud. The defendant Bank One Dayton, N.A. ("Bank One") seek to dismiss the complaint pursuant to CPLR Section 3211 on the grounds of lack of personal and subject matter jurisdiction, res judicata, lack of standing, failure to plead fraud, undue influence or breach of trust with particularity, and failure to state a cause of action. The defendant, Merrill Lynch, Pierce, Fenner & Smith, Inc. ("Merrill Lynch") seek an order dismissing the complaint pursuant to CPLR Section 3211(a)(7) upon the grounds that the complaint fails to state a cause of action.

The defendants have withdrawn their argument that this court lacks subject matter jurisdiction over plaintiff's RICO claim on the basis the Court of Appeals in *Simpson Electric Corp.* v. *Leucadia, Inc.*, 72 NY2d 450, decided October 25, 1988, held that state courts enjoy concurrent jurisdiction over civil RICO claims with the federal courts.

The plaintiff alleges that he is a New York resident and a shareholder of the Peter Kuntz Company ("Kuntz Company"). The Kuntz Company, a building supplies business, owned a majority interest of the share of two companies, the North Central Mortgage Company ("North Central") and Scioto Savings and Loan Association ("Scioto"). Plaintiff alleges that certain of the defendants formed a loan syndicate which loaned funds to North Central at higher rates than North Central could charge customers. As a result North Central suffered substantial losses which resulted in the sale of the Kuntz Company's interests in North Central and Scioto. It is further contended that the sale of

these entities facilitated the liquidation of Kuntz Company in July 1986.

Plaintiff further alleges that all of the defendants conspired to perpetrate a fraud contrary to the provisions of RICO as well as some sort of unlawful influence of the financial markets and control of North Central. The complaint asserts a damage claim of $1.62 billion "plus costs and disbursements and multiplied according to law." In view of the treble damage provisions of RICO, the complaint appears to seek damages exceeding $4.86 billion.

It appears that plaintiff seeks damages allegedly due to the decrease in value of the classes of stock he held in Kuntz Company as a result of the sale of North Central. The plaintiff has brought this action in his capacity as a shareholder of the Kuntz Company on behalf of Kuntz Company and in his own right.

The plaintiff previously brought an action against these defendants in the United States District Court for the Southern District of New York. The District Court dismissed the complaint on the grounds the plaintiff lacked standing to assert either a direct or derivative claim and that the court lacked pendant jurisdiction over the state claims. The United States Supreme Court denied plaintiff's motion to direct the clerk of the United States Court of Appeals for the Second Circuit to file a petition for a writ of certiorari.

The law is well settled that a shareholder has no right to bring an action in his own name and in his own behalf for a wrong committed against the corporation even though the particular wrong may have resulted in a depreciation or destruction of the value of the corporate stock (*Fifty State*

Management Corp. v. *Niagara Permanent Savings and Loan Association,* 58 AD2d 177, 179). Exceptions to this rule have been recognized where the wrongdoer has breached a duty owed to a shareholder independent of any duty owing to the corporation (*Abrams* v. *Donati,* 66 NY2d 951, 953).

Plaintiff relies on *Independent Investor Protective League* v. *Time, Inc.,* 50 NY2d 259, as authority for maintaining this action. However, the issue decided therein was that a shareholder derivative action may be maintained even though commenced after the subject corporation has effected a dissolution and distributed its assets (*id.* at 261). This action was against Time, Inc. which acquired Sterling, and the officers and directors of Sterling and alleged that Sterling at the behest of Time engaged in a course of mismanagement which depressed the value stock enabling Time to acquire Sterling at a price below its true value.

In the matter herein, the facts are inapposite to the facts in *Independent Investors,* supra. The plaintiff herein is not suing officers and directors of Kuntz Co. for mismanagement affecting shareholders' value but suing to recover for damage to Kuntz Co. Therefore, this court does not find any exception to the general rule that a shareholder has no right to maintain an action in his own behalf for depreciation or loss of value of the corporate stock. Thus the action herein must be dismissed due to lack of standing.

Furthermore, this court finds that this action is barred by res judicata in view of the District Court decision which is now final and binding.

CPLR Section 3013 provides that "Statements in a pleading shall be sufficiently particular to give the court and

the parties notice of the transaction, occurrences, or series of transactions or occurrences, intended to be proved and the material elements of each cause of action or defense." The complaint herein fails to satisfy the requirements of CPLR Section 3013 and must be dismissed (*Peri* v. *State of New York,* 66 AD2d 949, affd. 48 NY2d 734).

Defendants' motions to dismiss are granted. Defendants submit orders on notice without costs.

Dated: Ticonderoga, New York
May 19th, 1989

/s/ Dominick J. Viscardi
J. S. C.